But the availability and timing of congressional appropriations can limit the possibility of a plaintiff's relief in the form of money owed—sometimes called the "*res*."[31] Indeed, "in cases challenging an agency's expenditure of funds, the *res* at issue is identified by reference to the congressional appropriation that authorized the agency's challenged expenditure." *County of Suffolk v. Sebelius*, 605 F.3d 135, 141 (2d Cir. 2010).

This principle is grounded in separation of powers. The Appropriations Clause of the U.S. Constitution says that "[n]o money shall be drawn from Treasury, but in Consequence of Appropriations made by Law." U.S. CONST. art. I, § 9, cl. 7. Appropriations are Congress's wheelhouse. A court cannot order an agency to provide specific relief in the form of money when the agency does not have remaining funds for the challenged program or the relevant appropriation cycle has lapsed. *County of Suffolk*, 605 F.3d at 141; *City of Houston*, 24 F.3d at 1428 ("When the relevant appropriation has lapsed or been fully obligated . . . the federal courts are without authority to provide monetary relief."). That is because an agency cannot draw money from a pot that Congress has not given it authority to access.

B. Gonzalez's 2022 Fulbright-Hays Fellowship Application Claim Is Moot

Recall Gonzalez asks the Court to order the Department "to re-evaluate [her] [2022] application and award her the [Fulbright-Hays] Fellowship if her new score qualifies for funding." Mot. at 34–35. The problem is the Department's appropriations for the 2022 application cycle have lapsed and have been fully obligated. In the Consolidated Appropriations Act of 2022, Congress said that "[n]o part of any appropriation contained in this Act shall remain

[31] Funds may be unavailable for several reasons, including a lapse in the appropriation, or because "the funds have already been awarded to other recipients," or because "Congress [has] rescind[ed] the appropriation." *City of Houston*, 24 F.3d at 1426.

available for obligation beyond the current fiscal year unless expressly so provided herein."[32] Pub. L. No. 117-103, Title V, § 502, 136 Stat. 49, 144 (2022). The fiscal year ended on September 30, 2022.[33] Gonzalez may have been able to preserve her interest in her 2022 application and 2022 funding if she had filed for relief before the end of the fiscal year, *cf. City of Houston*, 24 F.3d at 1426–27, but she did not do so, *see* Mot. at 35 (dated Jan. 3, 2023).[34]

The Department has also fully obligated all of its 2022 Fulbright-Hays Fellowship funds. Resp. at 20; *see also* U.S. Dep't of Educ., *Fulbright-Hays—Doctoral Dissertation Research Abroad: Funding Status* (last visited Mar. 15, 2023), https://www2.ed.gov/programs/iegpsddrap/funding.html (showing fiscal year 2022 funds as fully awarded). The lack of 2022 funds is an independent reason why Gonzalez cannot obtain the relief she seeks. Requiring the Department to award Gonzalez with a Fulbright-Hays Fellowship because of a re-reviewed and successful 2022 application would not be specific relief. Specific relief would be an award of funds appropriated by Congress for the 2022 application cycle. *See County of Suffolk*, 605 F.3d at 141. What Gonzalez requests is money damages, from which the Department is immune, *City of Houston*, 24 F.3d at 1428 ("Section 702 permits monetary awards only when . . . such an award constitutes *specific relief*—that is, when a court orders a defendant to pay a sum owed out of a specific *res*.").

[32] Congress did not provide an exception when it appropriated funds for the Fulbright-Hays Fellowship. *See* Pub. L. No. 117-103, 136 Stat. 49, 482–83 (2022).

[33] U.S. Dep't of the Treasury, FiscalData (last visited Mar. 15, 2023), *available at* https://tinyurl.com/Treasury-FiscalData.

[34] In fact, Gonzalez was not a plaintiff in this case until November 16, 2022, when Plaintiffs filed their Amended Complaint—after the end of the fiscal year. *Compare* Am. Compl. ¶¶ 1–6, *with* Compl., ECF No. 1 ¶¶ 1–5.

Gonzalez resists that conclusion by arguing she is not seeking 2022 funds. She insists the Department can reevaluate her 2022 application and award her 2023 funds. *See* Mot. at 34–35; Reply at 12. There is a distinction, however, "between original funds and substitute funds . . . in cases involving yearly grant appropriations." *Modoc Lassen Indian Hous. Auth. v. U.S. Dep't Hous. & Urb. Dev.*, 881 F.3d 1181, 1197 (10th Cir. 2017). And that distinction is dispositive. *Id.* (citing *County of Suffolk*, 605 F.3d at 141, and *City of Houston*, 24 F.3d at 1428). The best the Court could do—as Gonzalez suggests—is order the Department to fund her desired 2022 Fulbright-Hays Fellowship with 2023 funds, but that would be impermissible money damages. *Id.*

Modoc Lassen clarifies the Court's conclusion. There, several Indian tribes ("Tribes") sued the U.S. Department of Housing and Urban Development ("HUD") to recover funds HUD had deducted from yearly grants it provided to the Tribes under a program established by the Native American Housing Assistance and Self-Determination Act ("NAHASDA"). *Id.* at 1186. HUD had been deducting money from the Tribes' NAHASDA grants to recoup funds it alleged it had overpaid to the Tribes in previous years. *See id.* at 1186, 1192. The Tribes argued, among other things, that HUD had no authority to deduct the money, and the Tenth Circuit agreed. *Id.* at 1192–95. But the Tenth Circuit also concluded that despite HUD's unlawful actions, the Tribes could not get relief because any award would be money damages. *See id.* at 1195–98. Accordingly, the Tenth Circuit reversed the district court's order requiring HUD to reimburse the Tribes from future NAHASDA appropriations. *See id.* at 1196–97.

The same is true here. Any relief the Court could provide Gonzalez relative to her 2022 Fulbright-Hays Fellowship application would require the Department to draw on funds outside the 2022 appropriation. But "[a]n award of monetary relief from any source of funds other than

[the relevant year] would constitute money damages rather than specific relief, and so would not be authorized by APA section 702." *City of Houston*, 24 F.3d at 1428. Thus, Gonzalez is unlikely to succeed on her claim for relief relative to her 2022 application. As in *City of Houston*, Gonzalez's claims related to her 2022 Fulbright-Hays Fellowship application are likely moot.[35]

III. DISCUSSION

The parties' dispute over the preliminary relief Gonzalez seeks as to her prospective 2023 Fulbright-Hays Fellowship application remains live. *Compare* Gonzalez Decl. ¶ 11 ("I plan to re-apply when the 2023 application cycle opens."), *with* Notice 2023 Application Cycle, 88 Fed. Reg. 8832, 8832–37 (2023) (2023 application cycle is open). A proposition the Department does not challenge. *See generally* Resp.

A. Preliminary Injunction Standard

Preliminary injunctions are "extraordinary remed[ies]" and are "never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain a preliminary injunction, a plaintiff must show:

(1) that she is likely to succeed on the merits;

(2) that she is likely to suffer irreparable harm in the absence of preliminary relief;

(3) that the balance of equities tips in her favor; and

[35] Gonzalez also tries to save her 2022 application by arguing she is seeking "the *specific relief* to which [she] is entitled"—that is, Fulbright-Hays Fellowship money generally. *See* Reply at 11–12 (emphasis added). It's true that after *City of Houston* the D.C. Circuit clarified that "[w]here a plaintiff seeks an award of funds to which it claims entitlement under a statute, the plaintiff seeks specific relief, not damages." *Am's Cmty.*, 200 F.3d at 829. And it's true that Gonzalez is seeking Fulbright-Hays Fellowship money, and that she likely "doesn't care whether" the Department pays her from 2023 appropriations or some other source. *See Modoc Lassen*, 881 F.3d at 1196. But that is of no moment here. "[T]he fungibility of money can easily obscure the difference between (1) relief that seeks to compensate a plaintiff for a harm by providing a substitute for the loss, and (2) relief that requires a defendant to transfer a specific *res* to the plaintiff." *Id.* (cleaned up). As explained, the specific *res* Gonzalez seeks for her 2022 application is gone.

(4) that an injunction is in the public interest.

Id. at 20. The plaintiff has "the burden of persuasion on all four elements." *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 329 (5th Cir. 2005) (quotations omitted).

B. Gonzalez Is Likely to Succeed on the Merits of Her Administrative Procedure Act Claim

Gonzalez challenges the Department's interpretation of "foreign language" in section 2452(b)(6) as being inconsistent with the Fulbright-Hays Act. Mot. at 23–31. In other words, Gonzalez argues that the Department exceeded its statutory authority when it interpreted "foreign language" to mean a language foreign to the applicant rather than foreign to the United States. *See, e.g.*, *id.* at 24–26; *see also* 5 U.S.C. § 706(2)(C) (providing that a court must "hold unlawful and set aside agency action . . . found to be . . . in excess of statutory . . . authority")

More specifically, Gonzalez makes two arguments. She first claims that Congress never authorized the Department "to make rules carrying the force of law" with respect to the Fulbright-Hays Fellowship, so the Department's interpretation of "foreign language" in section 2452(b)(6) should not receive *Chevron* deference. Reply at 7 (quoting *Kornman & Assocs., Inc. v. United States*, 527 F.3d 443, 454 (5th Cir. 2008)); Mot. at 26 (citing *United States v. Mead Corp.*, 533 U.S. 218, 231 (2001)). She then contends that even if the Department could issue legally binding regulations, the Department's interpretation of "foreign language" conflicts with section 2452(b)(6)'s unambiguous terms and thus fails the *Chevron* test. Reply at 7–8; Mot. at 24–26. The Department counters that its interpretation of "foreign language" in section 2452(b)(6) "is consistent with its meaning in the underlying statute" and thus warrants *Chevron* deference. Resp. at 22.

Start with a quick overview of the relevant legal framework. Federal administrative agencies, like the Department, operate under authorities Congress grants to them. Quite often,

agencies must interpret the statutes Congress has tasked them with administering. *See Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984). In turn, litigants often ask federal courts to decide whether an agency's interpretation of a statute is lawful.

The APA requires courts to "hold unlawful and set aside agency action . . . found to be . . . arbitrary, capricious, an abuse of discretion, [] otherwise not in accordance with law . . . [or] in excess of statutory . . . authority." 5 U.S.C. § 706(2)(A), (C); *see also Chevron*, 467 U.S. at 844 (explaining that any regulation that is "arbitrary, capricious, or manifestly contrary to the statute" is not to be "given controlling weight"). To decide whether to set aside an agency's interpretation of a statute, courts principally look to two leading Supreme Court cases and their progeny: *Mead* and *Chevron*.

Mead requires courts to ask a threshold question: Did Congress grant the agency power to make binding rules in the first instance? *Mead*, 533 U.S. at 226–27. If the answer is "yes," courts then evaluate whether to defer to the agency's interpretation of the statute it administers.[36] *Chevron*, 467 U.S. at 842–45.

The rule of deference to an agency's interpretation recognizes that agencies are sometimes in a better position than courts to determine what a particular statutory provision means.[37] *See Chevron*, 467 U.S. at 844. For example, if an issue is scientific or technical, agency experts may well have the knowledge necessary to produce effective rules implementing

[36] Other leading cases, which are not relevant here, guide courts when the answer to the threshold question is "no." *See, e.g.*, *Mead*, 533 U.S. at 227–28, 234–35 (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)).

[37] Deference also recognizes that Congress often writes statutes with flexibility so the government can quickly adapt to changing circumstances. *E.g.*, *Texas v. United States*, 497 F.3d 491, 504 (5th Cir. 2007) (Jones, J.) ("When it so desires, Congress has the power to confer expansive interpretive authority on agencies to accommodate changing or unpredictable circumstances."); *West Virginia v. EPA*, 142 S. Ct. 2587, 2642–43 (2022) (Kagan, J., dissenting).

Congress's policy goals. *E.g.*, *Sierra Club v. EPA*, 939 F.3d 649, 680 (5th Cir. 2019) ("A reviewing court must be most deferential to an agency where . . . its decision is based upon its evaluation of complex scientific data within its technical expertise." (cleaned up)); *West Virginia*, 142 S. Ct. at 2642–43 (Kagan, J., dissenting). The *Chevron* Court recognized as much:

> the principle of deference to administrative decisions has long been consistently followed by [courts] whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in a given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

Chevron, 467 U.S. at 844 (quotation omitted). Hence, we have *Chevron* deference. When deciding whether to ultimately defer to an agency's interpretation courts apply the *Chevron* two-step framework: First, "is the question whether Congress has directly spoken to the precise question at issue," which requires a court to determine whether the relevant statute is silent or ambiguous about the issue. *See id.* at 842–43. If the statute is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

At the same time, the Supreme Court has recognized that sometimes an agency's interpretation of a statute is so misguided that it conflicts with Congress's express intent, in which case a court must set aside the agency's interpretation. *See, e.g.*, *id.* at 842–43 ("If the intent of Congress is clear that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 321 (2014) ("Even under *Chevron*'s deferential framework, agencies must operate within the bound of reasonable interpretation." (quotation omitted)).

1. Congress Delegated Binding Rulemaking Authority to the Department and the Department Promulgated the Foreign-Language Criterion in Exercise of Its Authority

To qualify for *Chevron* deference—or, more precisely, the application of the *Chevron* two-step framework—Congress must have "delegated authority to the agency generally to make rules carrying the force of law,"[38] and "the agency interpretation claiming deference [must have been] promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226–27; *see also Sierra Club v. Trump*, 929 F.3d 670, 692 (9th Cir. 2019) (explaining that "[t]o determine whether the *Chevron* framework governs at all," a court must first apply the "'step zero' inquiry" the Supreme Court announced in *Mead*).

There's a particularly strong signal that Congress intended an agency to have the authority to issue legislative rules: notice-and-comment rulemaking authority.[39] *See, e.g.*, *Mead*, 533 U.S. at 227, 229–31; *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 805 (5th Cir. 2010). But Congress does not always explicitly authorize an agency to issue regulations after notice-and-comment. That does not, however, always end the inquiry, as "some other indication of comparable congressional intent" can show that Congress intended to give an agency legislative rulemaking authority. *Mead*, 533 U.S. at 227.

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[38] Rules that carry the force of law are often called "legislative rules." *E.g.*, *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250 (D.C. Cir. 2014) (Kavanaugh, J.) (quoting *INS v. Chadha*, 462 U.S. 919, 986 n.19 (1983)). Legislative rules "purport[] to impose legally binding obligations or prohibitions on regulated parties." *McCarthy*, 758 F.3d at 251–52; *Am. Tort Reform Ass'n v. OSHA*, 738 F.3d 387, 395 (D.C. Cir. 2013) ("Substantive or legislative rules are those that grant rights, impose obligations, or produce other significant effects on private interests." (quotation omitted)). For example, a legislative rule might establish "substantive standards by which [an] agency evaluates applications which seek a benefit that the agency has the power to provide." *See Texas*, 787 F.3d at 766 (cleaned up).

[39] Notice-and-comment rulemaking, however, is not a necessary condition for *Chevron* deference. *See, e.g.*, *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002) (looking to certain factors to decide that the agency's interpretation, "reached . . . through means less formal than 'notice and comment' rulemaking," should nonetheless be given *Chevron* deference); *Texas v. United States*, 809 F.3d 134, 178 n.160 (5th Cir. 2015).

The Court now turns to the Fulbright-Hays Act. In section 2452, Congress did not explicitly authorize the Department to promulgate rules and regulations. *Compare* 22 U.S.C. § 2452 (authorizing the President to establish exchanges for "promoting modern foreign language training and area studies in United States schools," without mentioning regulations), *with* 22 U.S.C. § 2258a(c) (authorizing the Secretary of State "to promulgate regulations for the purposes of this section"). Even so, Congress commanded the Department "*to provide for* . . . [exchanges for] promoting modern foreign language training . . . in United States schools." 22 U.S.C. § 2452(b)(6) (emphasis added).

But Congress provided only skeletal details about its desired foreign language exchanges. *See id.* To give substance to Congress's authorization, the Department necessarily had to detail the parameters of any foreign language exchange it established. *See* 34 C.F.R. Part 662. Congress thus, at minimum, implicitly gave the Department the authority to make legislative rules implementing section 2452(b)(6). *Cf. White v. Scibana*, 390 F.3d 997, 1000–01 (7th Cir. 2004) (explaining agency had "implicit in its authority" the "discretion to resolve ambiguities" pursuant to notice-and-comment rulemaking); *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 452–53 (6th Cir. 2013) (concluding Congress authorized agency to conduct notice-and-comment rulemaking even though statute did not explicitly confer such authority); *cf. also Barnhart*, 535 U.S. at 222 (concluding *Chevron* deference was warranted for an agency's interpretation that did not go through notice-and-comment rulemaking but, among other things, answered an "interstitial . . . legal question" and was "important[t] . . . to administration of the statute"). In other words, Congress's use of "to provide for" implicitly shows "comparable congressional intent" that the Department have legislative rulemaking authority. *See Mead*, 533 U.S. at 227–26.

That the Department issued the Fulbright-Hays Fellowship regulations pursuant to notice-and-comment procedures reinforces this conclusion. *See* 63 Fed. Reg. 46,358, 46,358 (1998) (reviewing regulatory procedural background). While Congress's provision of notice-and-comment rulemaking authority is the strongest signal of legislative rulemaking authority, an agency's use of notice-and-comment procedures can indicate legislative rulemaking authority. *See, e.g.*, *Freeman*, 626 F.3d at 805 ("Where the agency has not used a deliberative process such as notice-and-comment rulemaking, . . . the court cannot presume Congress intended to grant the interpretation the force of law."); *Swallows Holding, Ltd. v. C.I.R.*, 515 F.3d 162, 169–71 (3d Cir. 2008) (applying *Chevron* to an agency's interpretive rule because "the Secretary opened the rule to public comment, [which is] a move that is indicative of agency action that carries the force of law").

The Department's use of notice-and-comment rulemaking authority also answers the second question in *Mead*. The Department promulgated the Fulbright-Hays Fellowship regulations under the rulemaking authority Congress granted it. Thus, the Court will apply *Chevron*'s two-step framework to the Department's interpretation of "foreign language." *See Mead*, 533 U.S. at 226–27 ("[T]he agency interpretation claiming deference [must have been] promulgated in the exercise of that authority."); *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980–81 (2005); *see also Nat'l Mining*, 758 F.3d at 251 ("Legislative rules generally receive *Chevron* deference.").

2. Whether the Court Should Defer to the Department's Interpretation

The *Chevron* two-step (in greater detail): At step one, a court "ask[s] 'whether Congress has directly spoken to the precise question at issue.'" *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) (quoting *Chevron*, 467 U.S. at 842). Step one,

in other words, requires a court to determine "if the statute is 'truly ambiguous,'" *id.* (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019)), such that the agency had room to "formulat[e] policy and [] mak[e] rules to fill any gap left, implicitly or explicitly, by Congress," *Chevron*, 467 U.S. at 843 (quotation omitted). Only if the statute is ambiguous can a court move to step two. *Gulf Fishermens*, 968 F.3d at 460. At step two, a court asks "whether the agency's construction is permissible." *Id.* (cleaned up). "A permissible construction is one that reasonably accommodates conflicting policies that were committed to the agency's care by the statute." *Id.* (cleaned up).

a. "Foreign Language" Is Not Ambiguous

Step one brings the Court to the familiar land of statutory interpretation. Courts do "not defer to 'an agency interpretation that is inconsistent with the design and structure of the statute as a whole.'" *Gulf Fishermens*, 968 F.3d at 460 (quoting *Util. Air*, 573 U.S. at 321). So the Court must "'exhaust all the traditional tools of construction,' including 'text, structure, history, and purpose,'"—and, of course, context—to determine whether Congress has answered the question at issue or the statute is "truly ambiguous." *Id.* (quoting *Kisor*, 139 S. Ct. at 2415).

Begin with the text. *E.g.*, *Easom v. US Well Servs., Inc.*, 37 F.4th 238, 242 (5th Cir. 2022) (quoting *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018)). Recall that Congress authorized the Department to establish exchanges

> promoting modern *foreign language* training and area studies in United States schools, colleges, and universities by supporting visits and study in foreign countries by teachers and prospective teachers . . . for the purpose of improving their skill in languages and their knowledge of the culture of the people of those countries . . . .

22 U.S.C. § 2452(b)(6) (emphasis added). Congress did not define "foreign language," so the Court must interpret the term in accordance with its plain, "ordinary, contemporary, common

meaning." *E.g.*, *Easom*, 37 F.4th at 242 (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

But first, a hypothetical. Pretend you're a United States citizen of Brazilian descent and you speak three languages: English, Portuguese, and Hungarian. You're natively fluent in English and Portuguese. Now you're in a job interview for a position in the United States and your interviewer asks: "Do you speak any foreign languages?" What are you going to say? All bets are on you say, "Yes, I speak Portuguese and Hungarian." That's how you're likely to answer because, in that context, you understand "foreign" to mean "foreign to the United States" or "foreign language" to mean "a language other than English." That is also how Gonzalez answers the question.

If the Department were in your shoes, though, it would say, "Yes, I speak Hungarian." If that sounds strange, it's because it is. The Department interprets "foreign language" to mean a language that is foreign to the applicant. Resp. at 23–25. That is, a foreign language, according to the Department, is any non-native language the applicant speaks. 34 C.F.R. § 662.21(c)(3) (explaining that Fulbright-Hays Fellowship applicants are assessed for their "proficiency in one or more . . . languages (other than English *and the applicant's native language*)" (emphasis added)).

Let's see how that holds up against some dictionary entries. "Foreign" can mean several things including, "born in, belonging to, or characteristic of some place or country other than the one under consideration,"[40] "belonging to another; not one's own,"[41] or "of, from, in, or

[40] *Foreign*, Merriam-Webster Online (last visited Mar. 9, 2023), *available at* https://www.merriam-webster.com/dictionary/foreign.

[41] *Foreign*, Oxford English Dictionary Online (last visited Mar. 9, 2023), *available at* https://www.oed.com/view/Entry/73063?rskey=VtY067&result=2&isAdvanced=false#eid.

characteristic of a country or language other than one's own."[42] These definitions show that the meaning of "foreign" is context dependent. It can take on a meaning relative to a place (say, the United States) or a person (say, yourself). So both Gonzalez and the Department are right in that "foreign language" *could* mean a language foreign to the United States (e.g., anything other than English)[43] or foreign to the applicant (e.g., anything other than English or Portuguese). The dictionary definitions of "foreign" do not provide an adequate answer to the question of what Congress meant by "foreign language" in the Fulbright-Hays Act.

Nor should we necessarily expect them to. Dictionaries are mere tools. A court's "duty, after all, is to construe statutes, not isolated provisions" or words. *King v. Burwell*, 576 U.S. 473, 486 (2015) (quotation omitted). "So when deciding whether the language is plain, [courts] must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000)). In fact, "a word with many dictionary definitions"—like "foreign"—"must draw its meaning from its context." *See Gulf Fishermens*, 968 F.3d at 463 (cleaned up).

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[42] *Foreign*, The Oxford Pocket Dictionary of Current English (Oxford Univ. Press) (May 18, 2018), *available at* https://www.encyclopedia.com/social-sciences-and-law/law/law/foreign. The definition of "foreign" has not changed much. For example, in 1961—the year Congress passed the Fulbright-Hays Act—Webster's defined "foreign" as, among other things, "situated outside a place or country," "situated outside one's own country," "born in, belonging to, derived from, intended for, or characteristic of some place or country (as nation) other than the one under consideration," and "related to or dealing with other nation." *Foreign*, Webster's Third New International Dictionary (1961).

[43] The Court recognizes the United States does not have a national language. This Court, for instance, sits in El Paso, TX. No one could fairly say that Spanish is foreign to El Paso. But the question in this case is about a congressional statute that covers the whole United States. It's proper to ask, in that circumstance, about "foreign" relative to the United States, not relative to particular areas of the United States. In fact, when referencing the whole of the United States the federal government assumes English is the primary language. For example, a judicial officer must provide interpretation services if he "determines . . . that [a] party . . . or a witness . . . speaks only or primarily a language other than the English language." 28 U.S.C. § 1827(d)(1)(A); *see also Arteaga v. Cinram-Technicolor*, No. 3:19-CV-00349, 2020 WL 1905176, at *1 (M.D. Tenn. Apr. 17, 2020) ("Federal court filings must be in English, and documents written in another language must be filed with a translation.").

Section 2452(b)(6) speaks of supporting students' "visits and study in *foreign countries* . . . for the purpose of improving their skill in language and their knowledge of the culture of the people *of those countries*." 24 U.S.C. § 2452(b)(6) (emphasis added). Congress's use of "foreign" in this context clearly means "other than the United States." What else would be a "foreign country" to Congress? That suggests that "foreign," as used in "foreign language"—which is in the same subparagraph as "foreign countries"—likely also means foreign to the United States—that is, a language other than English. *See CSX Corp. v. United States*, 18 F.4th 672, 680 (11th Cir. 2021) (describing the consistent-usage canon as "stat[ing] that a 'word or phrase is presumed to bear the same meaning throughout the text.'" (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS § 25, at 170 (2012))).[44]

Broader context confirms this reading. Section 2452 speaks entirely of the United States in relation to other countries. *See, e.g.*, 22 U.S.C. § 2452 (using the phrase "between the United States and other countries" five times). It also speaks of "international cooperative relations" and gives the President—who exercises broad foreign affairs power, *see, e.g.*, *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 13–17 (2015)—the authority to conduct several activities related to fostering the United States' relationship with other countries, 22 U.S.C. § 2452(b).

Defining "foreign" as "foreign to the United States" also aligns with the Fulbright-Hays Act's stated purpose, which is, in part, "to enable the Government of the United States to increase mutual understanding between the people of the United States and the people of other countries by means of educational and cultural exchange." 22 U.S.C. § 2451. The Fulbright-

[44] *See also Genus Lifesciences, Inc. v. Azar*, 486 F. Supp. 3d 450, 460 (D.D.C. 2020) ("[I]dentical phrases in close proximity are, in particular, presumed to share the same meaning.").

Hays Fellowship is one of those educational and cultural exchanges. *See generally* 22 U.S.C. § 2452(b)(6); 63 Fed. Reg. 46,358 (1998).

Finally, legislative history confirms that Congress unambiguously intended "foreign language" to mean any language other than English.[45] Take this statement from the 1961 House Report—produced by the Committee on Foreign Relations—discussing the importance of the educational and cultural exchanges to be established by the Fulbright-Hays Act: "In the current struggle for the minds of men, no other instrument of foreign policy has such great potential." H. REP. NO. 87-1094, at 1–2 (1961), *as reprinted in* 1961 U.S.C.C.A.N. 2759, 2759. The context here, of course: the Cold War. More specific to this case, the Committee described section 2452(b)(6) as "a new authority that gives recognition to the importance of improving understanding and communication *between the people of the United States and foreign nationals*." *Id.* at 7 (emphasis added). The Senate agreed. Describing section 2452(b)(6), the Senate Committee on Foreign Relations said, "In developing language skills there is no real substitute for visiting and studying in the country where the language is used." S. REP. NO. 87-372, at 10–11 (1961).

Given the text, context, purpose, and history, the Court concludes that Gonzalez is likely to show that Congress intended "foreign language" to mean a language other than English. The Fulbright-Hays Act is unlikely to be "truly ambiguous" and the Department's interpretation of "foreign language" is likely "inconsistent with the design and structure of the statute as a whole." *See Gulf Fishermens*, 968 F.3d at 460. In which case, the Court cannot defer to the Department's interpretation. *See id.*

[45] *See Bolen v. Dengel*, 340 F.3d 300, 310 (5th Cir. 2003) (looking to legislative history in a *Chevron* deference case).

b. The Department's Arguments to the Contrary are Unpersuasive

The Department cannot save the Foreign-Language Criterion. The Department begins by declaring that "'foreign language' is ambiguous at best." Resp. at 23. But the Department provides little support for its declaration. It first seizes on the definition of "foreign" that defines the term as "of, from, in, or characteristic of a country *or language other than one's own*."[46] The thing is, dictionary definitions can only go so far. For example, in this case, for every dictionary definition the Department has to support its position, Gonzalez has one that counters.[47] That stalemate does not exactly push the case forward.

So the Department jumps to context, arguing that it confirms "the reasonableness of the Department's interpretation." Resp. at 24. It contends that the words surrounding "foreign language"—"*promoting* modern foreign language *training*," 22 U.S.C. § 2452(b)(6) (emphasis added)—show that the Department's authority encompasses promoting the *acquisition* of a *new* language—that is, a non-native language, Resp. at 24–25.[48] If that's true, the Department argues, then "foreign language" can reasonably mean a language foreign to the Fulbright-Hays Fellowship applicant. *Id.* Not so. While the Department certainly has the authority to promote

[46] *Foreign*, The Oxford Pocket Dictionary of Current English (Oxford Univ. Press) (May 18, 2018), *available at* https://www.encyclopedia.com/social-sciences-and-law/law/law/foreign (emphasis added).

[47] *Compare* Mot. at 25 (arguing "foreign" means "characteristic of some place or country other than the one under consideration" (quotation omitted)), *with* Resp. at 23 (arguing "foreign" means "of, from, in, or characteristic of a country or language other than one's own" (quotation and emphasis omitted)).

[48] The Department argues that "promoting" and "training" can be combined to reach this conclusion. Specifically, the Department argues that because "promote" means "to bring or help bring about" or "encourage," and "training" means "the skill, knowledge, or experience *acquired* by one that trains," section 2452(b)(6) can reasonably be read to mean Congress intended any foreign language exchange established under section 2452(b)(6) to be about "the acquisition of non-native language skills." Resp. at 24.

foreign language training, its authority does not go as far as it contends. Given the common understanding of "foreign language," the broader context that unambiguously speaks in terms of the United States in relation to other countries, and legislative history, the Department's search for ambiguity falls short.

Moreover, with respect, the Department's reasoning strikes the Court as dubious. The Department's argument seems to rest on the proposition that the Fulbright-Hays Fellowship will motivate people to acquire skills in a new language. But the Fulbright-Hays Fellowship is for *graduate* students. Historically, it pays around $35,000.[49] Not an insignificant amount, but in the broader context of higher education, also not that much.[50] With that, the Court doubts the proposition that people are deciding to learn a new language early enough—so that they have sufficient proficiency in the language to be competitive for a fellowship—simply so they might get a Fulbright-Hays Fellowship in graduate school.

Finally, the Department says its 60+ years of experience administering the Fulbright-Hays Fellowship led it to the understanding that "scarce resources are best directed to promoting acquisition of language skills." Resp. at 25. Putting aside the Court's skepticism about the Department's premise, the Court is not persuaded that the Department's experience and relevant expertise overrides the unambiguous meaning of "foreign language." And it is hard to see how it could. *Cf. Kisor*, 139 S. Ct. at 2414–15 (discussing relevance of agency expertise to deference but maintaining there is no deference unless there "is genuine[] ambigu[ity]"). Moreover, the

[49] *See* U.S. Dep't of Educ., *Fulbright-Hays—Doctoral Dissertation Research Abroad: FundingStatus* (last visited Mar. 15, 2023), https://www2.ed.gov/programs/iegpsddrap/funding.html.

[50] The Court recognizes too that there is a qualitative value in obtaining a Fulbright-Hays Fellowship.

consideration of an agency's policy choices is better left for the second step of *Chevron*, *see Chevron*, 467 U.S. at 843–44, 863–64, which the Court does not reach.

C. Gonzalez Is Likely to Suffer Irreparable Harm without Preliminary Relief

To establish the likelihood of irreparable harm, a "plaintiff need show only a significant threat of injury from the impending action, that the injury is imminent, and that money damages would not fully repair the harm." *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986); *see also Louisiana v. Ctrs. Disease Control & Prevention*, 603 F. Supp. 3d 406, 439–40 (W.D. La. 2020) (citing *Humana*). Although the Department has decided to reduce the value of the Foreign-Language Criterion from 15 points to one point, Gonzalez still carries her burden to show a likelihood of irreparable injury.

Begin with the fact that the Department awards relatively few Fulbright-Hays Fellowships each year. *See* U.S. Dep't of Educ., *Fulbright-Hays—Doctoral Dissertation Research Abroad: Funding Status* (last visited Mar. 15, 2023), https://www2.ed.gov/programs/iegpsddrap/funding.html (awarding an average of 92 fellowships each year for the last ten years). Last year, the Department received 177 applicants and awarded only 88 fellowships. U.S. Dep't of Educ., *Fulbright-Hays—Doctoral Dissertation Research Abroad: Awards* (last visited Mar. 15, 2023), https://www2.ed.gov/programs/iegpsddrap/awards.html (see document under "FY 2022"). Pre-COVID, the Department received substantially more applications but still awarded fellowships at nearly the same rate. *Compare, e.g.*, *id.* (see document under "FY 2016"), *with* U.S. Dep't of Educ., *Fulbright-Hays—Doctoral Dissertation Research Abroad: Funding Status* (last visited Mar. 15, 2023), https://www2.ed.gov/programs/iegpsddrap/funding.html (awarding 92 fellowships in FY 2016). All this to say, getting a Fulbright-Hays Fellowship is highly

competitive. *See, e.g.*, Mot. at 12–13 (discussing the "competitive nature" of the Fellowship); Am. Compl. ¶ 27 (similar).

Thus, even a one-point difference could make or break Gonzalez's chance of obtaining a Fulbright-Hays Fellowship, although this depends on the number of applicants and the strength of their applications. *Cf.* Compl. ¶¶ 25, 27 (describing the 5-point automatic deduction for "heritage speakers" as a "significant penalty"). The Department does not really push back on this. In fact, the Department—while recognizing Gonzalez is *guaranteed* to lose one point as a native Spanish speaker—says that Gonzalez's harm "would be minimal at best." Resp. at 27. But guessing that Gonzalez might suffer minimal harm—which does not necessarily mean the harm is not irreparable—cannot outweigh the fact that Gonzalez has carried her burden to show that she is under "a significant threat of injury" and "that the injury is imminent."[51] *See Humana*, 804 F.2d at 1394.

Without preliminary relief, Gonzalez is guaranteed to lose one point on her 2023 Fulbright-Hays Fellowship application for being a native Spanish speaker and, in a competitive field, one point could make the difference. Gonzalez has thus shown she is likely to suffer irreparable harm in the absence of preliminary relief.

D. The Balance of Equities and the Public Interest

Two factors remain: whether "the balance of equities tips in [Gonzalez's] favor" and whether "an injunction is in the public interest." *Winter*, 555 U.S. at 20. These final factors "overlap[] considerably" and so courts often consider them together. *See, e.g.*, *Texas*, 809 F.3d at 187 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). In fact, in this context, where the

[51] Money damages are unavailable in this APA action. *See supra* Section II; 5 U.S.C. § 702 (limiting a court's review of agency action to cases in which plaintiffs "seek[] relief other than money damages"); *see also Humana*, 804 F.2d at 1394 (requiring a plaintiff seeking a preliminary injunction to show "that money damages would not fully repair the harm").

Government is the opposing party, "[t]hese factors merge." *Nken*, 556 U.S. at 435. "In weighing equities, [the] [C]ourt 'must balance the competing claims of injury and must consider the effect on each of the granting or withholding of the requested relief.'" *Texas v. United States*, 524 F. Supp. 3d 598, 663 (S.D. Tex. 2021) (quoting *Winter*, 555 U.S. at 24).

The Department contends that "a preliminary injunction would undermine the regulatory process that is already underway to assess the Foreign-Language Criterion." Resp. at 31. As Gonzalez points out, Reply at 13, the Department cites zero authority for this proposition, *see* Resp. at 31–32. It also makes little sense. The Court does not see—and the Department does not explain—how invalidating the Foreign-Language Criterion interferes with or prevents the Department from going through the notice-and-comment process. *See Texas v. United States*, 40 F.4th 205, 220 (5th Cir. 2022) ("Apart from the constitutional or statutory basis on which [a] court invalidate[s] an agency action, vacatur neither compels nor restrains further agency decision-making.").

Nor will striking down the Foreign-Language Criterion disrupt the Department's review of 2023 Fulbright-Hays Fellowship applications. The application window remains open, 88 Fed. Reg. 8832, 8832 (2023) (application deadline: Apr. 11, 2023), and the Department has conceded the review process takes some time, *see* Advisory, ECF No. 29, at 3 ("[The] application and review process will take approximately seven months."). Finally, and most importantly, the Department has no interest in enforcing a regulation that likely conflicts with Congress's unambiguous statutory mandate. *See BST Holdings, LLC v. OSHA*, 17 F.4th 604, 618–19 (5th Cir. 2021) ("Any interest [the agency] may claim in enforcing an unlawful . . . [agency action] is illegitimate."). In sum, the balance of equities favors Gonzalez.

IV. CONCLUSION

The Court **GRANTS IN PART and DENIES IN PART** Plaintiff Veronica Gonzalez's "Motion for Preliminary Injunction" (ECF No. 25). The Court **DENIES** her requested relief as to her 2022 Fulbright-Hays Fellowship application, but **GRANTS** her requested relief as to her 2023 application. Consequently, the Court **VACATES** 34 C.F.R. § 662.21(c)(3) as to all 2023 Fulbright-Hays Fellowship applicants until the Court reaches a merits decision in this case or the U.S. Department of Education publishes a final rule amending 34 C.F.R. § 662.21(c)(3).[52]

The Court does not reach Gonzalez's claim that the Foreign-Language Criterion violates the United States Constitution's due process and equal protection guarantees. *See* Mot. at 16–23. With the Foreign-Language Criterion set aside, Gonzalez obtains the relief she seeks, and "[i]t goes without saying that constitutional questions should be avoided if there are independent 'grounds upon which the case may be disposed of.'" *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232, 235 (5th Cir. 2012) (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936)).

So ORDERED and SIGNED this ___ day of _____ 2023.

DAVID C. GUADERRAMA
UNITED STATES DISTRICT JUDGE

[52] Gonzalez requested that the Court enjoin the Department from applying 34 C.F.R. § 662.21(c)(3) to all applicants in the 2023 application cycle. Mot. at 35. The Department did not challenge the scope of Gonzalez's requested relief. *See generally* Resp. The Court enters Gonzalez's requested relief. *Cf. Texas*, 809 F.3d at 188.

Applicant Details

First Name	**Nghia**
Last Name	**Jones**
Citizenship Status	**U. S. Citizen**
Email Address	**nlj10@georgetown.edu**
Address	**Address** **Street** **250 American Way Apt 528** **City** **Oxon Hill** **State/Territory** **Maryland** **Zip** **20745**
Contact Phone Number	**919-454-7048**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**May 2019**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Law Journal**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Donohue, Laura
lkdonohue@law.georgetown.edu
Doran, Michael
mtd35@law.georgetown.edu
Butler, Paul
pdb42@georgetown.edu
(202) 662-9932

References

Dean Robin Lenhardt (Georgetown University Law Center - Agnes Williams Sesquicentennial Professor of Race, Law, and Justice): (973) 508-7087, ral25@georgetown.edu; Professor Jane Juliano (Georgetown University Law Center - Chief, Alternative Dispute Resolution Unit, U.S. Office of Special Counsel): (202) 656-1530, jane@juliano-resolutions.com; Professor Kelly Walsh (Georgetown University Law Center - Counsel at the Federal Deposit Insurance Corporation): (419) 450-0851, kw715@georgetown.edu

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Nghia Jones
250 American Way
Oxon Hill, MD 20745
919.454.7048
nlj10@georgetown.edu

June 23, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
540 Potter Stewart U.S. Courthouse
100 E. Fifth Street
Cincinnati, OH 45202

Re: 2024-2025 Clerkship Term

Dear Judge Stephanie Dawkins Davis:

I am a second-year Georgetown University Law Center student and an Articles Editor on the *Georgetown Law Journal*. I am writing to apply for a 2024-2025 clerkship with your chambers.

My mother and I lived in a lower-income area in Missouri before moving to a suburban neighborhood in Kansas for elementary school. This move exposed me to the disparities in resources, treatment, and access to justice that exist between different racial and socioeconomic communities. In my junior year of college, I took a constitutional law class that opened my eyes to the immense power of the law and the ability to use the law as a conduit for social change. That course sparked a passion for law within me, and as I enter the legal profession, I am now eager to use my skills and knowledge to make a meaningful impact in my community. I am excited about the prospect of supporting you, particularly as a woman of color who shares my commitment to public service and social justice.

Enclosed, please find my resume, list of references, law school transcript, and writing sample. Letters of recommendation from Professors Paul Butler, Laura Donohue, and Michael Doran will be sent under a separate cover.

Thank you very much for considering my application. I welcome the opportunity to interview with you and look forward to hearing from you soon.

Respectfully,

Nghia Jones

NGHIA JONES

250 American Way, Oxon Hill, Maryland 20745 • nlj10@georgetown.edu • 919.454.7048

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.
Candidate for Juris Doctor, May 2024 (Expected)
GPA: 3.42

Honors	Best Negotiator, Nelson Mandela International Negotiations Competition Negotiator of The Year, Georgetown ADR Advocacy Division of Barristers' Council Scholarship Recipient, Black Women Lawyers' Association Essay Contest Scholarships: PracticePro Diversity Scholarship, Opportunity Scholarship, RISE Diversity Fellowship, Sponsors of Educational Opportunities Law Fellowship
Activities	Articles Editor, *Georgetown Law Journal* Outgoing Career Co-Chair, Black Law Students Association Member, The Appellate Project Alumni Affairs Director, Barristers' Council - Alternative Dispute Resolution Division Constitutional Law Debate Coach, Legal Outreach

UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Chapel Hill, NC
Bachelor of Arts in Political Science, Minor in Entrepreneurship, May 2019

PROFESSIONAL EXPERIENCE

BAKER BOTTS LLP, Washington, D.C.
Incoming Summer Law Clerk — *Anticipated* July 2023 — August 2023

GOODWIN PROCTER LLP, Washington, D.C.
Diversity Fellow & Summer Law Clerk — May 2023 — Present

GEORGETOWN UNIVERSITY LAW CENTER, Washington, D.C.
Research Assistant for Dean Robin A. Lenhardt — February 2023 — Present
Criminal Justice Tutor — February 2023 — April 2023
Supreme Court Institute Judicial Clerk — January 2023 — April 2023
- Researched and drafted bench memoranda in preparation for moot courts

Teaching Fellow — January 2023 — January 2023
- Facilitated a simulation course about cultural competence, emotional intelligence, and implicit bias

U.S. SENATOR CHRIS COONS, COMMITTEE ON THE JUDICIARY, Washington, D.C.
Law Clerk — September 2022 — December 2022
- Drafted memoranda regarding legal arguments and questions relevant to pending legislation
- Researched legislative and case records in preparation for committee hearings

BAKER BOTTS LLP, Washington, D.C.
Summer Law Clerk — June 2022 — August 2022
- Assessed domestic and international methods of evaluating genetic material for use in mediation
- Researched work product privilege and the advice of counsel defense

FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP, Washington, D.C.
1L Leadership Council on Legal Diversity Scholar & Summer Law Clerk — May 2022 — June 2022
- Advised client regarding the implications of an incentive plan on a tax-free exchange
- Drafted motions, deposition questions, interrogatories, and requests for production of documents

SEO Law Intern — May 2021 — July 2021

INTERESTS: Baking Bread, DIY Projects, Watching UNC Basketball & Football

NGHIA JONES

250 American Way, Oxon Hill, Maryland 20745 • nlj10@georgetown.edu • 919.454.7048

RECOMMENDERS

Professor Paul Butler
Georgetown University Law Center
The Albert Brick Professor in Law
(202) 662-9932
pdb42@georgetown.edu

Professor Laura Donohue
Georgetown University Law Center
Scott K. Ginsburg Professor of Law and National Security
(202) 662-9455
lkdonohue@law.georgetown.edu

Professor Michael Doran
Georgetown University Law Center
Visiting Professor of Law
(434) 924-6331
michael.doran@georgetown.edu; mdoran@law.virginia.edu

REFERENCES

Dean Robin Lenhardt
Georgetown University Law Center
Agnes Williams Sesquicentennial Professor of Race, Law, and Justice
(973) 508-7087
ral25@georgetown.edu

Professor Jane Juliano
Georgetown University Law Center
Chief, Alternative Dispute Resolution Unit, U.S. Office of Special Counsel
(202) 656-1530
jane@juliano-resolutions.com

Professor Kelly Walsh
Georgetown University Law Center
Counsel at the Federal Deposit Insurance Corporation
(419) 450-0851
kw715@georgetown.edu

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: N hia L. Jones
GUID: [redacted]

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law/Business Law Scholars

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2021							
LAWJ	001	91	Civil Procedure Kevin Arlyck	4.00	B+	13.32	
LAWJ	004	11	Constitutional Law I: The Federal System Laura Donohue	3.00	B	9.00	
LAWJ	005	12	Legal Practice: Writing and Analysis Kristen Tiscione	2.00	IP	0.00	
LAWJ	008	91	Torts Girardeau Spann	4.00	B	12.00	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	34.32	3.12
Cumulative	11.00	11.00	34.32	3.12

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2022							
LAWJ	002	12	Contracts Nakita Cuttino	4.00	B+	13.32	
LAWJ	003	12	Criminal Justice Paul Butler	4.00	A	16.00	
LAWJ	005	12	Legal Practice: Writing and Analysis Kristen Tiscione	4.00	B	12.00	
LAWJ	007	91	Property Michael Gottesman	4.00	B	12.00	
LAWJ	025	50	Administrative Law Eloise Pasachoff	3.00	B	9.00	
LAWJ	611	08	Social Intelligence in the Practice of Law Nadine Chapman	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	20.00	19.00	62.32	3.28
Annual	31.00	30.00	96.64	3.22
Cumulative	31.00	30.00	96.64	3.22

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2022							
LAWJ	121	09	Corporations Donald Langevoort	4.00	B+	13.32	
LAWJ	1491	10	Externship I Seminar (J.D. Externship Program)		NG		
LAWJ	1491	92	~Seminar Sunita Iyer	1.00	A	4.00	
LAWJ	1491	94	~Fieldwork 3cr Sunita Iyer	3.00	P	0.00	
LAWJ	317	11	Negotiations Seminar Cathy Costantino	3.00	A-	11.01	
LAWJ	421	09	Federal Income Taxation Michael Doran	4.00	A	16.00	

In Progress:

	EHrs	QHrs	QPts	GPA
Current	15.00	12.00	44.33	3.69
Cumulative	46.00	42.00	140.97	3.36

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2023							
LAWJ	032	05	Advanced Criminal Procedure and Litigation	2.00	B+	6.66	
LAWJ	1174	05	Supreme Court Institute Judicial Clerkship Practicum	3.00	A	12.00	
LAWJ	1447	08	Mediation Advocacy Seminar	2.00	A-	7.34	
LAWJ	165	07	Evidence	4.00	P	0.00	
LAWJ	1768	05	The Temporal Dimensions of Governmental Powers Seminar	3.00	A-	11.01	
LAWJ	610	41	Week One Teaching Fellows (Social Intelligence in the Practice of Law)	1.00	P	0.00	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	15.00	10.00	37.01	3.70
Annual	30.00	22.00	81.34	3.70
Cumulative	61.00	52.00	177.98	3.42

End of Juris Doctor Record

Unofficial

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing in strong support of Ms. Nghia Jones, who is applying for a clerkship in your chambers. I first got to know Ms. Jones when I taught her Constitutional Law I during her 1L autumn. We have continued to meet regularly as she has progressed through law school.

I recommend Nghia without reservation. She is thoughtful, dedicated to her work, and determined to make a difference in this world. She is also extremely personable. It would be a delight to work with her.

I have seen Nghia grow tremendously in just two short years. From day one, she rose to the challenge that is law school. Although ConLaw I is only 3 credits, the material in many ways reflects a 4-credit course. To help the students prepare for constructing and responding to originalist and purposive constitutional arguments, I begin with the Magna Carta and the beheading of Charles I before moving to the Glorious Revolution and the English Bill of Rights as precursors to the Virginia Declaration of Rights and the Declaration of Independence. The students then read the Articles of Confederation and look at where the framework failed, before considering the debates at the Constitutional Convention, the subsequent ratification of the U.S. Constitution by the states, and the adoption of the Bill of Rights.

At that point, the course begins to look more like a conventional ConLaw course, as we turn to *Marbury v. Madison*. We study separation of powers and federalism, with the discussion ranging from the 10th Amendment to sovereign immunity. Students consider the enumerated powers in Article I(8), with particular emphasis on tax and spend, the commerce clause, and the necessary and proper clause, before turning to Art. II, executive direction and control, and Art. I/Art. II war powers. We then look political question doctrine and the role of the courts. At the end, the course returns to the question of whether the structure was sufficient to safeguard rights, with emphasis on the First Amendment.

In brief, the students have to absorb a tremendous amount of material and gain breadth and depth. Nghia did not miss a single class. She came every day, prepared, and was willing to take on arguments with which she both agreed and disagreed, to probe the strengths and weaknesses of precedential, purposive, historical, textualist, structuralist, and policy-based arguments.

Initially, Nghia waited for me to call on her (I cold call all students once a class). As the term progressed, she became increasingly comfortable jumping into the debate, participating up to five times in a single class, as she continued to hone her skills. As a result, over the course of 26 classes, Nghia contributed to the debate more than 50 times, which put among the top six students (out of 34) in the class. Her remarks were consistently thoughtful, on point, and central to the discussion.

Nghia has now taken those skills beyond the classroom: she is a Member of the Barristers' Council, a Member of the Appellate Project, and a Constitutional Law Debate Coach for Legal Outreach. In addition, she won Best Negotiator in the Nelson Mandela International Negotiations Competition. Nghia's dedication to her work reflects in other honors that she has received, such as earning a scholarship from the Black Women Lawyers' Association Essay Competition.
Nghia has an innate sense of curiosity and has constantly sought to learn as much as she can, as is reflected in her persistence in working both in big law and on the Hill. Last year, she split her summer between Fried, Frank, Harris, Shriver, & Jacobson, and Baker Botts—with the aim of learning as much as she could. This summer, she is doing it again, splitting between Goodwin Procter and Baker Botts. In the interim, she has clerked for U.S. Senator Chris Coons, on the Senate Committee on the Judiciary.

At Georgetown Law, Nghia has distinguished herself as a leader. She is an Articles Editor for the *Georgetown Law Journal*, as well as the Career Co-Chair for the Black Law Students Association. She is constantly reaching out to, and supporting, fellow students as they engage in the write-on process, moot court competitions, and the annual job search.

Nghia has dedicated time and effort to give back to underrepresented communities. She grew up with a single mom (who has moved to Washington, D.C. with her), and she is understands the difficulties that so many others have faced. As a student ambassador for Georgetown Law's Early Outreach Initiative, she speaks with high school students nationwide about preparedness for law school. She volunteers as a Legal Outreach debate coach, giving high school students early exposure to the legal profession. She has continued to hone her legal advocacy by working as a Research Assistant at the Racial Justice Institute. Following graduation, she would like to join an appellate practice where she can work on racial and social justice matters.

Nghia would love the opportunity to learn from someone who embodies the principles of the type of lawyer she wants to become. Please feel free to contact me if I can be helpful in considering her candidacy in any more detail. I hope that she will have the

Laura Donohue - lkdonohue@law.georgetown.edu

opportunity to continue her journey with you.

Yours sincerely,

Professor Laura K. Donohue, J.D., Ph.D. (Cantab.)

Laura Donohue - lkdonohue@law.georgetown.edu

UNIVERSITY of VIRGINIA | SCHOOL of LAW

Michael Doran
Professor of Law

May 1, 2023

Dear Judge:

I am writing to recommend Nghia Jones for a clerkship in your chambers. Nghia is a very good law student, and I am confident that she would be a successful law clerk. I recommend her highly, and I respectfully urge you to give her serious consideration.

Nghia was in my Federal Income Taxation course during the Fall of 2022 (although I am on the faculty at the University of Virginia, I have been visiting at Georgetown during the 2022 – 2023 academic year). Nghia did extremely well in the course, earning an "A" grade. She regularly asked thoughtful, probing questions, both during class and during office hours. It was clear to me throughout the term that she was engaging very closely with the often challenging material.

Because I came to know Nghia rather well this year, I have confidence in saying that her performance in my Federal Income Taxation course is a better indicator of her abilities than her first-year grades. Nghia seems to me a classic case of someone who needed the first year to get her sea legs in law school. But it is apparent to me that she is very smart, very hardworking, and very dedicated to her success as a lawyer.

Nghia's broad range of extracurricular activities at Georgetown give a fair indication of her energy level. Additionally, she is a very friendly, very pleasant individual. I have no doubt that she would contribute to a collegial working atmosphere in chambers.

In short, I hold Nghia in high regard. I am confident that she would serve you well as a law clerk, and I urge you to give her application close review.

Sincerely,

580 Massie Road, Charlottesville, Virginia 22903 | 434.924.6331 | mdoran@law.virginia.edu

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am writing to recommend Nghia Jones for a clerkship. Nghia was a student in my Criminal Procedure course. She received an "A" grade. Nghia also stopped by frequently during office hours so I got to know her better than most students. Nghia distinguished herself in class with her incisive analysis and excellent communication skills. I cold call on students in a sustained Socratic dialogue and Nghia was always not just well prepared but enthusiastic about participating. She has an inquisitive mind and a strong work ethic. I was not surprised that she wrote on the best exams in the course. As an articles editor of the prestigious Georgetown Law Journal, Nghia has further sharpened her legal research and writing skills.

Nghia has stayed in touch since the class ended. I have come to know her as a respectful and ambitious student committed to using her legal skills to helping people from background's like hers (she is a first generation law student). She is very kind and personable, and would be the kind of law clerk who everyone in the courthouse likes and respects. I recommend Nghia with great enthusiasm.

Sincerely,

Paul Butler
Albert Brick Professor in Law

Paul Butler - pdb42@georgetown.edu - (202) 662-9932

NGHIA JONES

250 American Way, Oxon Hill, Maryland 20745 • nlj10@georgetown.edu • 919.454.7048

WRITING SAMPLE

This writing sample is a paper I drafted for my Temporal Dimensions of Government Powers seminar last semester. This assignment required that I research and write a paper that explores and proposes how to address a current temporal powers issue. The paper examines the Supreme Court's jurisprudence on courts retroactively expanding their interpretation of criminal statutes. I focus on the Court's decision in *Rogers v. Tennessee*, 532 U.S. 451 (2001), compared to its prior decision in *Bouie v. City of Columbia*, 378 U.S. 347 (1964). I have shortened it in the interests of brevity. I eliminated sections 3 and 4 regarding how the lower courts have applied the *Rogers* rule and how the Court should revive the *Bouie* fair warning test. Please note that this paper is my work product and has not been substantially edited by anyone else.

WHITTLING A TOOTHPICK: HOW RETROACTIVE JUDICIAL ENLARGEMENT OF CRIMINAL STATUTES WEAKENS DUE PROCESS

Nghia Jones

> "Judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness . . . If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[1]

INTRODUCTION

On February 1, 1960, four North Carolina A&T State University students, David Richmond, Franklin McCain, Ezell Blair Jr. (Jibreel Khazan), and Joe McNeil staged a sit-in in Greensboro, North Carolina, to nonviolently further equal rights in the South.[2] On March 14, 1960, inspired by the actions of the Greensboro college students, two Black college students, Simon Bouie and Talmadge Neal, led a sit-in at Eckerd's drug store in Columbia, South Carolina.[3] Eckerd's drug store had a restaurant and other departments; however, the Black patrons were only allowed to shop at specific store departments.[4] Although Eckerd's did not post a sign explicitly stating that they would deny Bouie and Neal service,[5] it was an unstated understanding at that store, and many stores like it in the South, that the store would refuse service to Bouie and Neal because they were Black.[6]

Bouie and Neal peacefully sat at the lunch counter with books, waiting to be served[7] but were ignored by the attending waitresses.[8] Eventually, an employee put up a chain with a "no trespassing" sign.[9] The two students remained peacefully seated, so the store manager, accompanied by the police this time, provided a verbal warning to the students, telling them that they would not be served and should leave.[10] The students remained seated, so the officer said they

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[1] *Bouie v. City of Columbia*, 378 U.S. 347, 352 (1964).
[2] *See Greensboro Sit-In*, HISTORY (Jan. 25, 2022), https://www.history.com/topics/black-history/the-greensboro-sit-in; *see* Jaime Huaman, *Greensboro Four: David Richmond, Franklin McCain, Ezell Blair Jr. (Jibreel Khazan), Joe McNeil*, NCPEDIA (Sept. 13, 2010), https://www.ncpedia.org/greensboro-four; *see The Greensboro Four*, NORTH CAROLINA MUSEUMS OF HISTORY, https://files.nc.gov/dncr-moh/The%20Greensboro%20Four.pdf; *see* Michael Ray, *Greensboro sit-in*, BRITANNICA (Mar. 30, 2023), https://www.britannica.com/event/Greensboro-sit-in; *see Sit-ins*, THE MARTIN LUTHER KING, JR. RESEARCH AND EDUCATION INSTITUTE, https://kinginstitute.stanford.edu/encyclopedia/sit-ins.
[3] *See Bouie v. City of Columbia*, COLUMBIA SC 63, https://www.columbiasc63.com/timeline/march-14-1960/; *see Bouie*, 378 U.S. at 348.
[4] *See Bouie*, 378 U.S. at 348.
[5] *See id.*
[6] *See* Megan Sexton, *Telling the untold*, UNIVERSITY OF SOUTH CAROLINA (Oct. 24, 2018), https://www.sc.edu/uofsc/posts/2018/10/bobby_donaldson_research.php.
[7] *City of Columbia v. Bouie*, 124 S.E.2d 332, 333 (1962), rev'd, 378 U.S. 347 (1964).
[8] *Id*. at 333.
[9] *Bouie*, 378 U.S. at 348.
[10] *Bouie*, 124 S.E.2d at 333; *see Bouie*, 378 U.S. at 348.

were under arrest.[11] In addition to other charges, the State charged the students with criminal trespass, and on March 25, 1960, Bouie and Neal were found guilty of criminal trespass.[12]

Bouie and Neal appealed the decision of the trial court. Under the South Carolina statute, a person trespasses if they "enter upon the land of another" after they have received notice from the owner prohibiting entry.[13] They argued that they did not receive notice from the owner *before* that their presence in the diner was forbidden, so they did not violate the statute.[14] The Supreme Court of South Carolina affirmed the trespass charge because it "construed the statute to cover not only the act of entry on the premises of another after receiving notice not to enter, but also the act of remaining on the premises of another after receiving notice to leave."[15]

On June 10, 1963, the Supreme Court granted certiorari[16] to decide whether the State denied the students due process of law.[17] The Court determined that South Carolina judicially enlarged the criminal statute by "punish[ing] [the students] for conduct that was not criminal at the time they committed it" and "violat[ing] the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibit[s]."[18] The Court went on to explain that language that is on its face precise "lulls the potential defendant into a false sense of security" if a judicial construction of a criminal statute unexpectantly and indefensibly retroactively enlarges criminal conduct.[19] The Court determined that the law did not give Bouie and Neal fair notice that their conduct would violate the law, so it reversed the Supreme Court of South Carolina's decision, judicially exonerating Bouie and Neal.[20]

A few decades later, the Court decided *Rogers v. Tennessee,* which used the dicta in *Bouie* to establish that a retroactive judicial decision interpreting a law violates a person's due process rights when it is "unexpected *and* indefensible."[21] That holding contradicted the letter and spirit of *Bouie*. The Court in *Bouie* used the phrase "unexpected and indefensible" *once*. Nevertheless, the Court in *Rogers* has "wrenched [the phrase] entirely out of context."[22] The *Bouie* Court precedes its use of the phrase with a conversation about the general principles of criminal law, which "require[s] [that the] criminal law must have existed when the conduct in issue occurred."[23] The Court elaborated on this point by determining that if a judicial construction of a criminal statute is "unexpected and indefensible," it cannot be applied retroactively.[24] So, the Court in *Bouie* established that a person should have fair warning of what constitutes criminal conduct when it occurred, not that the Court can retroactively expand its interpretation of criminal law as long as the person has fair warning. By establishing that it is constitutional to retroactively apply a new or expanded judicial interpretation of a criminal statute as long as a defendant can reasonably anticipate or defend themselves against the new law, the *Rogers* Court narrowed the protections

[11] *Bouie*, 124 S.E.2d at 333.
[12] *Id*. at 332-33.
[13] *Bouie*, 378 U.S. at 350.
[14] *Bouie*, 124 S.E.2d at 333.
[15] *Bouie*, 378 U.S. at 350.
[16] *Bouie v. City of Columbia.*, 374 U.S. 805 (1963).
[17] *Bouie*, 378 U.S. at 349.
[18] *Id*. at 350-55 (alteration in original).
[19] *Id*. at 352.
[20] *Id*. at 350-63.
[21] *Rogers v. Tennessee*, 532 U.S. 451, 457 (2001) (emphasis added).
[22] *Id*. at 469 (Scalia, J., dissenting) (alteration in original).
[23] *Bouie*, 378 U.S. at 354 (alteration in original).
[24] *Id*.

given to criminal defendants in *Bouie*.[25] The *Rogers* Court put the onus on the defendant to anticipate how the law will change instead of requiring the legislature to draft a law with sufficient particularity[26] and the judiciary to enforce the statute as understood when the conduct occurred[27] so that the judiciary can apply the statute with the predictability the Constitution demands.[28]

Lower courts have used *Rogers* as the Court's clarification of its decision in *Bouie* and the Court's prevailing view of what retroactive judicial expansions of criminal statutes violated due process.[29] Because the *Rogers* Court neither defined "unexpected" nor "indefensible," it is easy for a court to adopt a favorable definition to establish that its judicial enlargement of a criminal statute is either expected or defensible. Consequently, the Court's new test created a high bar for these statutes to violate due process.[30]

This Note addresses how the Supreme Court's "unexpected and indefensible" test whittles away at due process by creating leeway for the judiciary to limit a defendant's due process rights. The temporal scope of judicial decisions is an area of debate; this Note does not question a court's ability to act retroactively but narrowly discusses the constitutionality of judges enlarging criminal statutes by interpretation and then applying those decisions retroactively. Part I will briefly overview how the Court defines ex post facto laws. Part II will discuss *Rogers* and its antecedents. Part III will discuss lower courts' attempts to define "unexpected and indefensible." Part IV will encourage the revival of the *Bouie* fair warning test.

I. COURT'S DEFINITION OF EX POST FACTO LAWS

Article I, § 9, Clause 3, of the Constitution states, "[n]o Bill of Attainder or ex post facto Law shall be passed."[31] The Ex Post Facto Clause prohibits legislatures from enacting laws that impose retroactive criminal punishment. The founders included this clause in the Constitution because of their great concern for the "creation of crimes after the commission of the fact, or, in other words, the subjecting of men to punishment for things which, when they were done, were

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[25] Heyward D. Armstrong, *Rogers v. Tennessee: An Assault on Legality and Due Process*, 81 N.C. L. REV. 317, 330 (2002).

[26] *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (citing *United States v. Hudson*, 11 U.S. 32, 34 (1812)) ("Vague laws also undermine the Constitution's separation of powers and the democratic self-governance it aims to protect. Only the people's elected representatives in the legislature are authorized to 'make an act a crime'"); *see Beckles v. United States*, 580 U.S. 256, 266 (2017) (citing *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966)) ("An unconstitutionally vague law invites arbitrary enforcement in this sense if it 'leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case'").

[27] *See Bouie*, 378 U.S. at 354.

[28] *See Johnson v. United States*, 576 U.S. 591, 606 (2015) (citing *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)) ("Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it 'promotes the evenhanded, predictable, and consistent development of legal principles'").

[29] *See* Armstrong, *supra* note 25, at 318; *see e.g.*, *State v. Redmond*, 631 N.W.2d 501 (2001) ("The U.S. Supreme Court clarified the holding of *Bouie* in *Rogers v. Tennessee* . . . retroactive judicial decisionmaking is . . . analyzed in accordance with the more basic and general principle of fair warning under the Due Process Clause . . . '*Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue'") (alteration in original).

[30] *See* Paul H. Robinson, *Fair Notice and Fair Adjudication: Two Kinds of Legality*, 154 U. PA. L. REV. 335, 355-56 (2005); *see* Armstrong, *supra* note 25, at 318; *see* Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 Am. J. Crim. L. 193, 201.

[31] U.S. Const. art. I, § 9, cl. 3 (alteration in original).

breaches of no law."[32] The founders and the Court make it clear that a person must have fair notice that specific conduct is criminal when the action occurred.

The Court has clarified that the Ex Post Facto Clause "is a limitation on the powers of the legislature and does not of its own force apply to the Judicial Branch."[33] However, the Court has determined that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law, such as Art. I, [§] 10, of the Constitution, forbids."[34] So, although the Ex Post Facto Clause does not apply to judicial decisions,[35] a court is "barred by the Due Process Clause from achieving precisely the same result by judicial construction."[36] Thus, the Court's definition of when an ex post facto violation occurs in the legislative context is helpful to understanding when a judicial decision, applied retroactively, violates due process.

In the seminal case *Calder v. Bull,* the Court recognized four categories of retroactive changes that the Ex Post Facto Clause prohibits. In relevant part, the Court determined that ex post facto laws are:

> **1st.** Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. **2nd.** Every law that aggravates a crime, or makes it greater than it was, when committed. **3rd.** Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. **4th.** Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[37]

The Court focuses on what was considered a crime at the time of the alleged criminal conduct, expressing great concern for legislatures "making an innocent action criminal, and punishing it as a CRIME."[38] Once again, the touchstone for criminality was whether there was fair notice of the crime at the time the alleged crime occurred. If there was fair notice, the next inquiry was if the retroactive act increased the punishment for the crime. The same values animating the Ex Post Facto Clause apply to the Due Process Clause.

II. PRE-*ROGERS* DECISIONS

The Fifth Amendment says that no one shall be "deprived of life, liberty or property without due process of law."[39] The Court has long held that due process requires that the law adequately

[32] THE FEDERALIST No. 84 (Alexander Hamilton).
[33] *Rogers*, 532 U.S. at 456 (citing *Marks v. United States*, 430 U.S. 188, 191 (1977)).
[34] *Bouie*, 378 U.S. at 353; *see Marks*, 430 U.S. at 191-92; *see Rogers*, 532 U.S. at 470 (Scalia, J., dissenting).
[35] *See Rogers*, 532 U.S. at 456 (citing *Marks*, 430 U.S. at 191) ("As the text of the [Ex Post Facto] Clause makes clear, it 'is a limitation upon the powers of the Legislature, and does not of its own force apply to the Judicial Branch of government'") (alteration in original).
[36] *Bouie*, 378 U.S. at 353-54; *see Rogers*, 532 U.S. at 458.
[37] *Calder v. Bull*, 3 U.S. 386, 390 (1798) (emphasis added).
[38] *Calder*, 3 U.S. at 391.
[39] U.S. Const. amend. XIV, § 1.

inform a defendant of "what the [law] commands or forbids."[40] There are three "manifestations" of the fair warning requirement: 1) the vagueness doctrine bars laws that a person of common intelligence "must necessarily guess at its meaning" 2) the rule of lenity "resolv[es] ambiguity in a criminal statute as to apply it to only conduct clearly covered," and 3) a court is barred from interpreting an otherwise clear statue in a new way and apply that decision retroactively.[41] The Court clarified that "the touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal."[42]

The Court's decision in *Rogers* was a sudden departure from *Bouie* and its antecedents and progeny in the test it sets for determining if a retroactive judicial decision violates due process. Before *Rogers*, the Court used a type of fair warning test that focused on the right to know what the law, *at the time of the crime*, "commands or forbids."[43] *Lanzetta*, *Pierce*, *Bouie*, *Rabe*, *Marks*, and *Lanier* pre-date *Rogers* and demonstrate how the Court defined "fair warning" for over six decades, amply showing the Court's dangerous step in recrafting the test outlined in *Bouie*. The *Rogers* Court determined that a criminal statute violates due process only if the criminal law is "unexpected and indefensible," focusing on the defendant's *awareness of a possible change* in the criminal code.[44]

A. Pre-*Bouie* Decisions

Lanzetta and *Pierce* illustrate that the Court's decision in *Bouie* was not an aberration in the Supreme Court's quest to define "fair warning." In all three "manifestations" of the fair warning requirement, the Court looks to the statute in place when the conduct occurred as a touchstone for determining criminal liability.

1. *Lanzetta v. New Jersey* (1939)

The Court in *Lanzetta* considered a New Jersey criminal statute that stated that "[a]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in this or in any other State, is declared to be a gangster"[45] The defendants were convicted under the statute and appealed the decision as a violation of the Due Process Clause.[46] The Court reversed the lower court's decision because the statute's vagueness did not warn the defendants that their conduct was criminal.[47] The Court did not focus on whether the law was expected or defensible. Instead, like in *Bouie*, the Court looked at whether the defendants had fair warning of what constituted criminal conduct.[48]

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[40] *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) (alteration in original); *see Connally v. General Construction Co.*, 269 U.S. 385, 391; *see Int'l Harvester Co. v. Kentucky*, 234 U.S. 216, 221 (1914).
[41] *United States v. Lanier*, 520 U.S. 259, 266 (1997) (alteration in original).
[42] *Id*.
[43] *Lanzetta*, 306 U.S. at 452; *see Pierce v. United States*, 314 U.S. 306, 311 (1941); *see Bouie*, 378 U.S. at 353.
[44] *See Rogers*, 532 U.S. at 463-64.
[45] *Lanzetta*, 306 U.S. at 452 (alteration in original).
[46] *Id*. at 453.
[47] *Id*. at 452-58.
[48] *See id*. at 453.

2. *Pierce v. United States* (1941)

In *Pierce*, the defendant had falsely presented himself as a representative of a government corporation, and the jury convicted him under 18 U.S.C. § 93. The statute states:

> [w]hoever, with intent to defraud either the United States or any person, shall falsely assume or pretend to be an officer or employee acting under the authority of the United States, or any Department, or any officer of the Government thereof, and shall take upon himself to act as such, or shall in such pretended character demand or obtain from any person or from the United States, or any Department, or any officer of the Government thereof, any money, paper, document, or other valuable thing, shall be fined not more than one thousand dollars, or imprisoned not more than three years, or both.[49]

Notably, the statute does not penalize those acting as an employee of a government *corporation*.[50] The trial court, however, refused to explain to the jury that impersonating a government corporation was outside the statute's scope.[51] The defendant appealed, arguing that by failing to inform the jury that his conduct was outside the statute's scope, the judge was enlarging covered criminal conduct. The Court determined that "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness."[52] It would have been easy for the Court to say there was no due process violation because the statute's expansion was not "unexpected" since the statute and statutory history signaled that Congress intended to punish such crimes. Instead, the Court focused on the law as written at the time of the conduct and found no room to enlarge the meaning to encompass the defendant's conduct.

B. Post-*Bouie* Decisions

The Court held in *Bouie* that the retroactive expansion of the criminal statute violated Bouie and Neals' due process rights because the statute did not provide fair warning that their actions were criminal. After *Bouie*, in *Rabe*, *Marks*, and *Lanier*, the Court maintained that a court should determine criminal liability by looking at the interpretation of the statute at the time the conduct occurred.

1. *Rabe v. Washington* (1972)

The defendant in *Rabe* owned a drive-in theater in Washington. Washington's statute, Wash. Rev. Code § 9.68.010, criminalized showing "obscene" motion pictures.[53] The defendant

[49] *Pierce*, 314 U.S. at 306 (alteration in original).
[50] *See id*.
[51] *See id*.
[52] *Id*. at 311.
[53] *Rabe v. Washington*, 405 U.S. 313, 314 (1972) (citing Wash. Rev. Code § 9.68.010) ("Every person who -- (1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book,

showed a movie with "sexually frank" scenes in his drive-in theatre and was charged and convicted under the statute, and the Supreme Court of Washington affirmed the conviction. Under the Supreme Court of Washington's interpretation of the law, the defendant could have shown the same movie "to adults in an indoor theater with impunity."[54] Nevertheless, since the defendant showed the movie in an outdoor theatre, "the context of its exhibition" meant that the defendant violated the statute. The Court reversed the conviction because, when the conduct occurred, the defendant did not have fair notice that the criminal liability depended on where he showed the motion picture.

2. *Marks v. United States* (1977)

In *Marks*, the defendants had been charged with violating 18 U.S.C. § 1465, a statute that prohibited the transportation of obscene materials in interstate commerce.[55] Before the trial, but after the offending conduct, the Supreme Court decided a case that announced a new standard for determining what material was obscene, which widened the scope of material covered under the statute.[56] The trial court instructed the jury to use the new standard. The defendants were convicted, and the Sixth Circuit affirmed that conviction. The Court reversed the judgment and remanded the case. The Court held that "in accordance with *Bouie*, [] the Due Process Clause precludes the application [of the new standards] to petitioners . . . to the extent that those standards may impose

magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or (2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene; Shall be guilty of a gross misdemeanor").

[54] *Rabe*, 405 U.S. at 315.

[55] *Marks*, 430 U.S. at 189; *see* 18 U.S.C.S. § 1465 ("Whoever knowingly produces [obscene materials] with the intent to transport, distribute, or transmit in interstate or foreign commerce, or whoever knowingly transports or travels in, or uses a facility or means of, interstate or foreign commerce or an interactive computer service (as defined in section 230(e)(2) of the Communications Act of 1934) in or affecting such commerce, for the purpose of sale or distribution of any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined under this title or imprisoned not more than five years, or both") (alteration in original).

[56] *See Marks*, 430 U.S. at 190. On June 12, 1973, the Court decided *Miller v. California*, announcing a new standard for obscene material. 413 U.S. 15, 29 (1973) ("It is certainly true that the absence, since *Roth* [*v. United States*, 354 U.S. 476 (1957)], of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate 'hard core' pornography from expression protected by the First Amendment. Now we may abandon the casual practice of *Redrup v. New York*, 386 U.S. 767 (1967), and attempt to provide positive guidance to federal and state courts alike") (alteration in original). *Compare Miller*, 413 U.S. at 24 ("we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value"), *with Memoirs v. Massachusetts*, 383 U.S. 413 (1966) ("We defined obscenity in *Roth* in the following terms: 'Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.' 354 U.S. at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value").

criminal liability for conduct not punishable under [the old standards] . . . since the petitioners were indicted for conduct occurring prior to our [new standards]."[57]

3. *United States v. Lanier* (1997)

Finally, *Lanier* was a case where a jury convicted a defendant under 18 U.S.C.S. § 242 of criminally violating the constitutional rights of five women by sexually assaulting them.[58] The *en banc* Sixth Circuit set aside the conviction. The Circuit Court expressed that it could only hold the defendant criminally liable if the Court had identified the conduct as a crime before it occurred and if the factual circumstances were "fundamentally similar."[59] The Supreme Court vacated the judgment and remanded the case, determining that the Circuit Court used the wrong standard to determine whether there was fair warning that the defendant's conduct was criminal. Citing its decisions in *Marks*, *Rabe*, and *Bouie*, the Court expressed that "due process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope."[60] The Court held due process requires that "the statute, either standing alone or as construed, made it reasonably clear *at the relevant time* that the defendant's conduct was criminal."[61] Four years before *Rogers*, the Court, as it did for decades, maintained that "fair warning" was determined by what was understood to be a crime when the conduct occurred.

C. The *Rogers* Decision

In a sudden and consequential shift from its prior fair warning definition, the Court in *Rogers* held that a defendant is only denied due process if the new interpretation of the criminal statute is "unexpected and indefensible."[62] Under that test, a court can retroactively apply a new interpretation of a criminal statute if the defendant (at the time of the alleged criminal conduct) has fair notice that the statute *could* change.

1. *Rogers v. Tennessee* (2001)

The facts underlying *Rogers* are gruesome. On May 6, 1994, Wilbert K. Rogers stabbed James Bowdery with a butcher knife.[63] Bowdery went into cardiac arrest during the surgery to repair the injuries.[64] Bowdery survived the procedure but remained in a coma until he died on August 7, 1995.[65] Rogers was convicted under Tennessee's homicide statute,[66] and he appealed his conviction arguing that the common law rule "precluded his conviction."[67]

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[57] *Marks*, 430 U.S. at 196 (alteration in original).
[58] *Lanier*, 520 U.S. at 261-62.
[59] *Id*. at 263.
[60] *Id*. at 266.
[61] *Id*. (emphasis added).
[62] *Rogers*, 532 U.S. at 462.
[63] *Id*. at 454.
[64] *Id*.
[65] *Id*.
[66] The Tennessee statute does not have a temporal element to determine criminal liability. *See* Tenn. Code Ann. § 39-13-201 (1997) ("the unlawful killing of another person which may be first degree murder, second degree murder, voluntary manslaughter, criminally negligent homicide or vehicular homicide").
[67] *Rogers*, 532 U.S. at 454.

The common law rule precluded a defendant from being charged with murder if the victim did not die a year and a day after the act.[68] In evaluating the appeal, the Supreme Court of Tennessee recognized the viability of the common law rule at the time of the stabbing but found that because most jurisdictions had "legislatively or judicially abolished" the rule, the justifications for the rule no longer existed.[69] It abolished the common law rule and applied that decision retroactively. Thus, the Tennessee Supreme Court affirmed Rogers's conviction and determined that its decision did not violate *Bouie's* articulation of the Due Process Clause requirements because the change to the law was expected and defensible.[70] The Court affirmed the lower court's decision.

The Court veering from its practice of not retroactively applying new or expanded interpretations of criminal law held that eliminating the year-and-a-day rule did not violate Rogers's due process rights.[71] The Court determined that although the law changed after Rogers committed the act, the change in the law was not unexpected or indefensible because the viability of the law had been in question.[72] The Court has long held that laws should be clear and people should not have to "necessarily guess at [their] meaning and differ as to its application."[73] The Court had similarly held that criminal liability was determined by laws in place when the conduct occurred.[74] The Court's decision in *Rogers* destabilizes those established due process principles and creates a legal pathway for what was historically considered unconstitutional violations.

[68] *Id*. at 455-56.
[69] *Rogers*, 532 U.S. at 463.
[70] *Id*. at 453.
[71] *See id*. at 453-67.
[72] *See id*. at 464-67.
[73] *Connally*, 269 U.S. at 391 (alteration in original).
[74] *See Lanzetta*, 306 U.S. at 452; *see Pierce*, 314 U.S. at 311; *see Bouie*, 378 U.S. at 353.

NGHIA JONES

250 American Way, Oxon Hill, Maryland 20745 • nlj10@georgetown.edu • 919.454.7048

WRITING SAMPLE

This writing sample is a bench memorandum I drafted for my Supreme Court Institute Judicial Practicum seminar this semester to prepare a professor to moot the petitioner in *Arizona v. Mayorkas*. The memorandum examines whether the D.C. Circuit abused its discretion in denying Petitioners' motion to intervene on appeal. Please note that this memorandum is my work product and has not been substantially edited by anyone else.

From: Nghia Jones
To: Professor Nager
Re: *Arizona v. Mayorkas*, No. 22-592
Date: Monday, February 20, 2023

Question Presented

Whether the State applicants may intervene to challenge the District Court's summary judgment order.

Background

I. Factual Background

In response to the COVID-19 outbreak, the Trump administration exercised its power under 42 U.S. Code § 265. In relevant part, § 265 states:

> [w]henever the Surgeon General determines . . . the existence of any communicable disease in a foreign country there is serious danger of the introduction of such disease into the United States . . . in accordance with regulations approved by the President, shall have the power to prohibit, in whole or in part, the introduction of persons and property from such countries or places as he shall designate in order to avert such danger, and for such period of time as he may deem necessary for such purpose.

In March 2020, the Director of the Center for Disease Control and Prevention ("CDC") issued an interim final rule that suspended the admission of persons from countries deemed dangerous to public health. J.A. 14. The CDC Director requested that the Department of Homeland Security ("DHS") implement the March 2020 Order because of the CDC's lack of capacity and resources. *Id*. This Order was effective for thirty days and was extended several times. *Id*. In September 2020, the CDC published a final rule to indefinitely prevent the entry of persons whose entry into the country might introduce a serious disease into the United States. J.A. 16. That final rule became known as the "Title 42 policy."

Joe Biden took office in January 2021, and by February 2021, President Biden ordered a prompt review of the necessity and appropriateness of the Title 42 policy. J.A. 17. The CDC eventually terminated the Title 42 policy, effective May 23, 2022. *Id*.

Nancy Gimena Huisha-Huisha is one of a group of asylum-seeking plaintiffs who are suing Alejandro Mayorkas in his official capacity as Secretary of Homeland Security. J.A. 10. On February 5, 2021, the plaintiff filed a motion for a preliminary injunction against the implementation of the Title 42 policy, and the motion was granted on September 16, 2021. J.A. 18. On October 11, 2021, Texas unsuccessfully moved to intervene as an intervenor-defendant because they failed to meet the standard for intervention on appeal. J.A. 222-23. In November 2022, the court granted the plaintiff's motion for partial summary judgment, vacating and setting aside the Title 42 policy and declaring that the policy was arbitrary and capricious under the Administrative Procedure Act ("APA"). J.A. 8. On December 7, 2022, the defendant filed a notice

to appeal the decision the Title 42 policy was arbitrary and capricious. J.A. 218. Because the CDC terminated the Title 42 policy in May 2022, it did not appeal the judgment that the policy should be vacated and set aside. J.A. 1. In December 2022, Arizona and eighteen other states unsuccessfully moved to intervene to appeal the termination of the Title 42 policy. *Id*.

II. Other Relevant Background - *Louisiana v. CDC*

In response to the CDC's April 2022 termination announcement, on May 5, 2022, twenty-four states (including all eighteen states seeking to intervene in this suit) sought to enjoin the implementation of the termination of the Title 42 policy in the United States District Court for the Western District of Louisiana ("*Louisiana* case"). J.A. 19. On May 20, 2022, the District Court preliminarily enjoined the termination of the policy. J.A. 160-61. The federal government filed its notice on the same day to appeal that decision to the Fifth Circuit.

III. Procedural Background

The Petitioners are the States of Arizona, Louisiana, Alabama, Alaska, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, Texas, Tennessee, Utah, Virginia, West Virginia, and Wyoming ("States"). On December 9, 2022, Petitioners notified the court of their pending motion to intervene to appeal the District Court's order to vacate the Title 42 policy. J.A. 243. On December 16, 2022, Circuit Judges Millett, Walker, and Pan denied the States' motion to intervene because the application was not timely. The States appeal that decision. Petitioners timely sought review from this Court; certiorari was granted on December 27, 2022. The oral argument is scheduled for March 1, 2023.

IV. Decisions Below

United States Court of Appeals for The District of Columbia Circuit. The D.C. Circuit denied the States' motion to intervene. *See Huisha-Huisha v. Mayorkas*, No. 22-5325. The panel relied on this Court's decisions in *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, in which this Court held that a party should move to intervene as soon as it is alerted that its interests would no longer be protected. 142 S. Ct. 1002, 1010 (2022) (citing *NAACP v. New York*, 413 U.S. 345 (1973)). The D.C. Circuit also pointed to *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d at 1257, where the court held that if a motion is not timely, it is unnecessary for the court to continue the intervention analysis. The panel concluded that the unexplained untimeliness, including the case pending for two years, weighed against granting the motion to intervene. The court focused on two key events: 1) the termination of the Title 42 policy in May 2022 and 2) the federal government's opposition to the plaintiffs' motion for partial summary judgment filed in August 2022, which the United States did not argue that an injunction against the Title 42 policy would cause harm. The court suggested that these critical events should have alerted the States that the federal government would not vigorously pursue preserving its existing policy. Additionally, the court noted that "Texas prior effort to intervene . . . put the States on notice . . . '[f]or most of 2022'. . . that their interest cease[d] to overlap with the United States." J.A. 5.

Standard of Review

This Court reviews the Court of Appeals' intervention decision for an abuse of discretion.

Authority

I. Federal Rule of Civil Procedure 24

Rule 24 of the Federal Rules of Civil Procedure governs intervention in district courts. The rule does not apply explicitly to courts of appeal, but this Court has held that the same considerations apply. *Cameron*, 142 S. Ct. at 1012. In relevant part, Rule 24 states:

> (a) INTERVENTION OF RIGHT. On timely motion, the court must permit anyone to intervene who:
>
> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) PERMISSIVE INTERVENTION.
>
> (1) *In General*. On timely motion, the court may permit anyone to intervene who:
>
> (A) is given a conditional right to intervene by a federal statute; or
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> (2) *By a Government Officer or Agency*. On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:
>
> (A) a statute or executive order administered by the officer or agency; or
>
> (B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.
>
> (3) *Delay or Prejudice*. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

II. Key Precedents

Four decisions are particularly important here: *NAACP v. New York*, 413 U.S. 345 (1973); *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977); *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022); and *Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191 (2022).

***NAACP v. New York*, 413 U.S. 345 (1973).** In *NAACP v. New York*, this Court held that denying the motion to intervene was not an abuse of discretion because the motion was untimely. *Id*. at 366. The case arose after the United States Attorney General determined that New York used a voting test that violated Section 4 of the Voting Rights Act. On December 3, 1970, New York brought an action seeking a declaratory judgment that its policy did not violate the Act. On March 17, 1971, New York sought summary judgment. On April 5, 1971, counsel for the National Association for the Advancement of Colored People ("NAACP") was informed that the Department of Justice would not file a motion opposing New York's motion for summary judgment. Recognizing that the Attorney General no longer represented its interests, the NAACP moved to intervene on April 7, 1971. New York opposed the motion on multiple grounds. As relevant here, New York argued that the motion was untimely because the decision to intervene came after the case had been pending for four years. On April 13, 1971, the District Court granted New York's motion for summary judgment and denied the NAACP's motion to intervene. The NAACP appealed.

This Court held that denying the motion to intervene was not an abuse of discretion because the motion was untimely. *Id*. at 366. The District Court could have reasonably concluded that the appellants knew about the pending action from media sources or community leaders. *Id*. at 367. Further, the United States' answer to New York's complaint on March 10 indicated that it lacked sufficient evidence to oppose summary judgment. *Id*. at 367. Consequently, it was on the NAACP to take "immediate affirmative steps to protect their interest." *Id*. By failing to act when it should have been on notice of the United States' position, the NAACP did not satisfy the timeliness requirements needed to intervene. *See id*. at 369. Because the NAACP did not meet the timeliness requirement, it was unnecessary to consider whether the other conditions under Rule 24 were satisfied. *Id*.

***United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977).** In *United Airlines, Inc. v. McDonald*, this Court held that the respondent's motion to intervene was timely because she moved to appeal as soon as it was clear that the plaintiffs would no longer protect her interests. The case arose after United Airlines' policy requiring stewardesses, not stewards, to remain unmarried. This suit was brought as a class action on behalf of all those discharged because of the policy. The District Court defined the class as employees terminated because of the policy and filed charges under a fair employment statute or United's collective bargaining agreement. Only a few satisfied both requirements, so the District Court determined that the remaining class members were insufficient to satisfy the numerosity requirement of FRCP 23(a)(1). The Seventh Circuit denied the plaintiff's request for an interlocutory appeal. Twelve married stewardesses were permitted to intervene, and the litigation proceeded as a joint suit. The District Court determined that the discharged employees were entitled to reinstatement and back pay. That determination caused the parties to settle, and the court dismissed the case. A stewardess who was not a member of the joint suit filed a motion to intervene in the adverse class determination order. The District Court denied intervention, and the Seventh Circuit reversed. On appeal to this Court, the petitioner, United Airlines, challenged whether the respondent's intervention was timely.

This Court held that the respondent's motion to intervene was timely because she moved to appeal as soon as it was clear that the plaintiff would no longer protect her interests. *Id*. at 394-96. The Court determined that "[t]he District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs." *Id*. at 393. Further, since the

plaintiffs appealed the interlocutory order earlier in the proceedings, there was no reason for the respondent to know that the plaintiff would not appeal after the final judgment. *Id*. at 394. The respondent acted as soon as she was alerted that her interests would no longer be protected and within the time prescribed by the Federal Rules of Appellate Procedure; thus, the Respondent's motion was timely.

***Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002 (2022).** In *Cameron v. EMW Women's Surgical Ctr*, this Court held that the Sixth Circuit erred in denying the attorney general's motion to intervene. The case arose after Kentucky passed House Bill 454 ("H.B. 454") regulating an abortion procedure. EMW Women's Surgical Center ("EMW") sued to enjoin the enforcement of H.B. 454. The named defendants included the Health and Family Services secretary and the Kentucky attorney general. The attorney general stipulated that "H.B. 454 does not confer upon the Attorney General the authority or duty to enforce the provisions as enacted." *Id*. at 1022. EMW, therefore, agreed to dismiss the claims against the attorney general. The dismissal stipulated that the attorney general's office "reserved 'all rights, claims, and defenses . . . in any appeals arising out of this action and agreed to be bound by 'any final judgment . . . subject to any modification, reversal or vacation of the judgment on appeal.'" *Id*. at 1004. After a bench trial, the District Court held that H.B. 454 was unconstitutional, and the secretary filed a notice of appeal. While the appeal was pending, Kentucky elected a new attorney general and Health and Family Services secretary. The Sixth Circuit affirmed the District Court's judgment, and the secretary informed the new attorney general that they would not appeal that decision. The attorney general moved to intervene as a party on the Commonwealth's behalf, and the Sixth Circuit denied the motion as untimely. This Court granted certiorari on whether the Sixth Circuit should have permitted the attorney general to intervene.

This Court held that the Sixth Circuit erred in denying the attorney general's motion to intervene. *Id*. at 1008-14. The States should have a "fair opportunity to defend their laws" *Id*. at 1011. Citing its decision in *NAACP*, 413 U.S. at 365-66, the Court determined that "[t]timeliness is to be determined from all the circumstances." Here, the Court determined that the attorney general sought to intervene "'as soon as it became clear' that the Commonwealth's interests 'would no longer be protected,'" which was two days after the secretary alerted the attorney general that they would not defend H.B. 454 on appeal. *Id*. at 1012.

***Berger v. N. Carolina State Conf. of the NAACP*, 142 S. Ct. 2191 (2022).** In *Berger v. N. Carolina State Conf. of the NAACP*, this Court held that the North Carolina General Assembly members were entitled to intervene because the North Carolina Constitution gave both the Governor and the State power to intervene. The case arose after North Carolina amended its constitution to require voters to present a photographic identification to vote. The North Carolina General Assembly ("General Assembly") approved S.B. 824 to implement that constitutional mandate. The North Carolina chapter of the NAACP brought an action against the Governor, and the State Board of Elections ("Board"), claiming that S.B. 824 violated the Fourteenth and Fifteenth Amendments of the U.S. Constitution. Two members of the General Assembly (the speaker of the House of Representatives and the president tempore for the Senate) moved to intervene on behalf of the General Assembly. The District Court denied the motion to intervene because the Governor and Board would adequately represent their interests. The court noted that the General Assembly might someday have an interest, but since the action had just commenced, it was not evident that the Governor or the Board would not adequately defend its interest. The

members of the General Assembly moved to intervene again, claiming that the Board's primary objective was obtaining guidance about enforcing the law instead of defending it. The General Assembly was denied intervention and asked the Fourth Circuit to vacate that decision. The *en banc* Fourth Circuit decided that the General Assembly could not intervene because they could not establish that their interests were not adequately represented. The General Assembly appealed this decision.

The question before this Court was whether the General Assembly has a right to give the two members standing to intervene on behalf of the General Assembly and "any judicial proceeding challenging a North Carolina statute or provision of the North Carolina Constitution." *Id*. at 2198. The Court determined that because the North Carolina Constitution gave both the Governor and the State power to intervene is indicative that the different parties may seek to "vindicate different and valuable state interest." *Id*. at 2205. Important interests would not be adequately represented without the General Assembly's participation. *Id*. The Court concluded that the General Assembly had a right to intervene to allow for full consideration of North Carolina's interest. *Id*. at 2205-06.

Contentions

I. Petitioner's Argument

The States were alerted that their interest "would no longer be protected" when the Federal Respondents declined to seek a stay pending appeal and moved to intervene six days after they abandoned the defense. Pet. Br. 18. Thus, the D.C. Circuit erred in 1) holding that the Petitioners should have intervened before the partial summary judgment, 2) failing to consider whether the States intervened within the 14-day time limit for petitioning for rehearing en banc, 3) "failing to consider potential prejudice," and 4) not factoring in other considerations. Pet. Br. 13.

To the first point, the applicable clock starts running when "the [defendants] ceased defending the [challenged] law, and the timeliness of [the] motion should be assessed in relation to that point in time." *Cameron*, 142 S. Ct. at 1012. Pet. Br. 18. The need to defend the challenged law arose when the Federal Respondents acquiesced to the District Court order to terminate Title 42. Pet. Br. 18.

Second, another part of the inquiry is whether the States acted promptly after the entry of final judgment and if they "filed [their] motion within the time period in which the [existing parties] could have taken an appeal." *United Airlines*, 432 U.S. at 395-96. Pet. Br. 19. Since the States moved to intervene one day before the District Court entered judgment, they satisfied the benchmark articulated in *United Airlines*, 432 U.S. at 395, requiring that they move promptly after the entry of final judgment." Pet. Br. 18-19.

Third, the Court considered potential prejudice to the existing parties. Pet. Br. 20. *See Cameron*, 142 S. Ct. at 1013-14; *see NAACP*, 413 U.S. at 369. Here, the States do "not seek to advance new arguments"; instead, they will advance the defense previously raised by the Respondents. Pet. Br. 21.

Fourth, the D.C. Circuit failed to look at the totality of the circumstances adequately. Pet. Br. 22. Before the partial summary judgment, there was no indication that the Federal Respondents were not vigorously defending the Title 42 policy. *Id*. In the Federal Respondents' brief in *United States v. Texas*, No. 22-58, the Federal Respondents told this Court that the APA does not authorize vacatur as a remedy. Pet. Br. 23. Further, Texas was denied its motion to intervene because its

position was aligned with the Federal Respondents and was waiting for an adequate time to intervene. *Id*.

The remaining requirements for intervention are established. Pet. Br. 37. The States have standing because of the economic burdens that the termination of Title 42 would place on the States would cause a direct injury that is traceable to the termination of the policy. Pet. Br. 37-42.

If the Court does not grant intervention as of right, it should alternatively grant permissive intervention. Pet. Br. 48. For the aforementioned reasons, the intervention was timely. *Id*. Additionally, they assert that a favorable exercise of discretion is warranted to protect against the Federal Respondents' attempt to evade APA requirements. Pet. Br. 49-50.

II. Individual Respondents' Argument

The Petitioners did not move to intervene when they were alerted that their interests "would no longer be protected" by the Federal Respondents. Huisha-Huisha Br. 10. Thus, the D.C. Circuit did not abuse its discretion because it 1) applied the proper test and 2) found that the circumstances should have alerted the States their interests might diverge from the Respondents. Huisha-Huisha Br. 11-12. Further, The Petitioners' arguments that their intervention will not prejudice the Respondents, and the totality of the circumstances, weigh in their favor by arguing that 1) the untimeliness is causing ongoing prejudice to the Respondents and 2) the States' other considerations are wrong and misguided. *Id*.

A minimal burden exists to show that a party inadequately represents an interest. An intervenor should not wait until there is an absolute certainty that its interests are inadequately protected. Huisha-Huisha Br. 6. The Court held in *Berger*, 142 S. Ct. at 2203-04 that the States could intervene although there was a party that represented some of their interests because the intervenor "[sought] 'to give voice to a different perspective.'" Huisha-Huisha Br. 15. In *NAACP*, 413 U.S. 345, the Court held that the NAACP's motion to intervene was untimely even though they moved to intervene days after the federal government stopped defending its interests. The NAACP was put "on notice of the risk that their interest would diverge" from the federal government when it answered New York's complaint indicating that it lacked sufficient knowledge to dispute the State's complaint. Huisha-Huisha Br. 16. Allowing the States to intervene would run afoul of the test set in *NAACP*, 413 U.S. 345, and the Court's prior decisions. The States should have intervened when they became aware of the risk of inadequate representation, not when the United States stopped defending their interest. Huisha-Huisha Br. 16-17.

The D.C. Circuit did not abuse its discretion in deciding that the circumstances should have alerted the States that their interest diverged from the federal government. Huisha-Huisha Br. 18. The Petitioners' claim that they were caught completely by surprise when the federal government did not seek a stay pending an appeal is inaccurate because 1) Texas's motion to intervene indicated that they were aware that its interests might diverge from the federal government's and 2) subsequent events following the denial of the motion to intervene should have alerted them that their interest was at odds with the federal government's. Huisha-Huisha Br. 19-24. The Petitioners have been aware of the case since August 2021. Huisha-Huisha Br. 25. Further, Texas moved to intervene in October 2021, and in its motion to intervene, it noted that its interests would likely diverge from the federal government's. *Id*. Thus, the D.C. Circuit properly found that the CDC's April 2022 Termination of the Title 42 policy alerted the intervenors that their interests would not be adequately represented. Huisha-Huisha Br. 31. The *Louisiana* case indicates that the

termination of the Title 42 policy not only should have alerted the States but "did alert them" that "the federal government's stake in perpetuating Title 42 differed from theirs." *Id*.

The untimeliness is causing ongoing harm and prejudice. Huisha-Huisha Br. 31. The untimeliness is prejudicial because if the States intervened sooner, it would be less likely to delay the procedures. Huisha-Huisha Br. 32-37. However, since the States were untimely, the Court's decision to grant a stay of the policy pending the Court's decision, in this case, means that the harms caused by the Title 42 policy persists. *Id*.

The States' argument that the assertion that the federal government seeks to circumvent the APA is irrelevant to the timeliness inquiry. Huisha-Huisha Br. 38. Even if the federal government was engaging in underhanded maneuvers, Texas identified the risk more than a year ago and cannot use that as an excuse for its delayed intervention. Since the motion to intervene was untimely, there was no other need to consider whether the other conditions of Rule 24 were satisfied. Huisha-Huisha Br. 38-40. *See NAACP*, 413 U.S. at 347.

In response to the Petitioners' request that the Court grant the States permissive intervention, the Court's holding in *NAACP*, 413 U.S. at 365 requires timeliness regardless of whether the "intervention be claimed of right or as permissive." Huisha-Huisha Br. 48. Thus, since the Petitioners fail to satisfy the timeliness requirement for the abovementioned reasons, the Respondent argues that the Court should not grant the Sates permissive intervention. Huisha-Huisha Br. 48-49.

III. Federal Respondents' Argument

The United States argues that the order denying intervention should be affirmed for two reasons. First, this Court's ruling in *NAACP*, 413 U.S. at 366, established that the Court should not disturb the sound discretion of the lower courts unless "that discretion is abused." U.S. Br. 19. Timeliness is based on the totality of the circumstances test set out in *Cameron*, 142 S. Ct. at 1012, and the termination of the Title 42 policy and the preliminary injunction sought in the *Louisiana* case clearly indicate that the federal government's interest diverged from the Petitioners. *Id*. Second, the D.C. Circuit was well within its discretion in deciding that the Petitioners should have intervened sooner because the Court "affirmed a denial of intervention based on a much shorter delay after much more equivocal indications of a divergence of interests" in *NAACP*, 413 U.S. at 366. U.S. Br. 21. Thus, their motion to intervene was not timely because the States did not take "affirmative steps to protect their interests" after the CDC's Termination of the Title 42 policy in April 2002. U.S. Br. 21-22.

The States' assertion that the Court's precedent supports their position lacks merit for four reasons. First, the federal government did not "'abandon defense' of the Title 42 orders." U.S. Br. 22. They "vigorously defended those orders;" nevertheless, the Court had never endorsed such a rule but instead held that a nonparty should intervene when it became apparent that their interests were not being protected. U.S. Br. 22-23. Second, *United Airlines*, 432 U.S. 385 does not create an exception to the requirement to move to intervene once the nonparty was alerted that its interests were not protected. U.S. Br. 23. Third, Petitioners unjustly fault the D.C. Circuit for not evaluating the potential prejudice to the States because "a specific finding of prejudice is a prerequisite to a denial of intervention based on timeliness." U.S. Br. 24. Instead, the Court has "repeatedly instructed that would-be intervenors must act 'promptly.'" U.S. Br. 24; s*ee United Airlines,* 432 U.S. at 394; *see Cameron*, 142 S. Ct. at 1012; *see NAACP*, 413 U.S. at 367. Fourth, the Petitioners

conflate the federal government's position that the Title 42 policy was lawful with its unwillingness to oppose the permanent injunction of the Title 42 policy. U.S. Br. 25-26.

Petitioners lack the support that "the government's failure to seek an emergency stay pending appeal justifies intervention." U.S. Br. 34. *Berger*, 42 S. Ct. at 2197 authorized the state legislature to intervene to protect its laws and policies. U.S. Br. 25. Here, the federal government is defending its policy; further, allowing states to intervene whenever they assert an "attenuated interest" would frustrate Congress's judgment to give the Solicitor General the authority to defend the laws and policies of the federal government. U.S. Br. 35. Rule 24 requires a "significant protectable interest." Petitioners have no cognizable interest in maintaining CDC's public health policies. The interests Petitioners argue are at stake are the increased expenditures associated with healthcare, education, law enforcement, and processing driver's licenses; these interests do not have to do with the purpose of Title 42, which was to reduce the spread of the COVID-19 virus. U.S. Br. 38-39. Economic interests are not sufficient to justify intervention. U.S. Br. 41. Lastly, States have "standing to challenge federal policies only if it has suffered a 'direct injury.'" U.S. Br. 45. Here, the Title 42 policy does not directly injure the Petitioners. The federal government's Title 8 policy will replace its Title 42 policy, which will not "require [the States] to act or to refrain from acting . . . or deprive them of any legal rights." *Id*.

IV. The Petitioners' Reply

First, The Respondents' position that the States' intervention was untimely conflicts with *United Airlines*, *NAACP*, and *Cameron*. Reply Br. 4. The need to defend the challenged law arose when the Federal Respondents acquiesced to the District Court order to terminate Title 42; there was no way to conclude that the federal government's "shifting policy preferences" should have alerted the States to intervene. Reply Br. 5-6. Further, there was no way for the States to know that the government would decline to seek a stay, and the States should not be required to predict the federal government's behavior. Reply Br. 7-9 ("An intervenor cannot be faulted for expecting consistency"). The Respondents' standard creates a Catch-22, denying the States the right to intervene for moving to intervene too early or too late. Reply Br. 14.

Second, the States have standing because of the economic burdens that the termination of Title 42 would place on the States would cause a direct injury that is traceable to the termination of the policy. Reply Br. 16-19.

V. Notable Amici

Brief of Scholars of Federal Civil Procedure. Amici focuses on how intervention alters the original parties' control over the litigation and presents judges with the challenging role of addressing unexpected facts and legal issues. They state that untimely intervention magnifies those concerns, so there should be a high burden for nonparties seeking to intervene. Nevertheless, they argue that because Rule 24 does not govern intervention on appeal, the Court should resolve this case narrowly so as not to speak to the range of issues in the appellate intervention context. They suggest that the Court instead allow the Advisory Committee on Appellate Rules to provide guidance through the rulemaking process.

Brief of Amicus Curiae of 60 Immigration Advocacy, Human Rights, And Legal Services Organizations. Amici focuses their brief on the harmful effect the Petitioner's

untimeliness is causing non-citizens, particularly vulnerable communities, like Black and Indigenous migrants and LGBTQ asylum seekers. They argue that the Court should affirm the D.C. Circuit's decision to deny the petitioner's motion to intervene because their motion is causing undue delay and prejudice.

Analysis

Although Rule 24 only speaks explicitly to intervention in district courts, its policies guide appellate intervention. *See Cameron*, 142 S. Ct. at 1012. On timely motion, a party can intervene as of right, or a court may permit a party to intervene. Fed. R. Civ. P. 24. Whether a motion to intervene is of right or permissive, Rule 24 as a preliminary matter requires that the motion to intervene be timely. *NAACP*, 413 U.S. at 365. Timeliness is determined when the circumstance "should have alerted" a nonparty that its interest might diverge from the existing parties'. *Id*. at 345; *Cameron*, 142 S. Ct. at 1013. The Petitioners' motion to intervene was not timely.

Here, the Petitioners assert that they were alerted of the federal government's failure to represent their interest when the government ceased defending the Title 42 policy on December 7, 2022. However, two key events precede the government's December 2022 failure to appeal vacatur of the Title 42 policy. First, the federal government terminated the Tile 42 policy in April 2022. Second, the States sought to enjoin that termination in the *Louisiana* case in May 2022. Those two events would have alerted the States that the federal government would not adequately represent their interests at least seven months before they moved to intervene. In *NAACP v. New York*, this Court determined that the District Court could have reasonably concluded that the petitioners could have moved to intervene sooner. The government's answer to the plaintiff's complaint indicated that it lacked sufficient evidence to oppose summary judgment and consequently would be unable to defend the NAACP's interest. Similarly, the petitioner "should have been alerted" that the government would not adequately defend their interest when it stated it would terminate the policy. All eighteen states seeking to intervene in this suit sued the federal government after it terminated the policy in Louisiana, which signaled that they were aware of the government's diverging interest.

A "minimal" burden exists to show that a party inadequately represents an intervenor's interest. *Berger*, 142 S. Ct. at 2203-04. The intervening parties' interests do not have to differ drastically from the party inadequately representing its interest. Even if the States somehow thought that the Federal Respondents and their interests closely aligned, the federal government decided to terminate the Title 42 policy, which would have alerted the States that intervention would have been proper "to give voice to a different perspective." *Id*. at 2204-05. Even if the States were unsure about the federal government's "shifting position," the intervenors should not wait until they are certain that their interests are inadequately protected. *See id.*; *see also NAACP*, 413 U.S. 345. If waiting less than a month to intervene constitutes untimeliness, waiting almost four months to intervene is surely untimely. *See NAACP*, 413 U.S. at 367.

The D.C. Circuit rightly determined that the States should have known before the District Court granted summary judgment that their interests were inadequately represented. There is no indication that the D.C. Circuit abused its discretion, and absent an abuse, the sound judgment of the lower court should not be disturbed. *NAACP*, 413 U.S. at 366. Because the motion to intervene was untimely, it was unnecessary to consider whether the other conditions under Rule 24 were satisfied. *Id*. at 347.

Recommendation

This Court should affirm the judgment of the D.C. Circuit because Arizona has failed to produce any compelling evidence that denying the States' motion to intervene on appeal constituted an abuse of discretion.

Applicant Details

First Name	**Faith**
Last Name	**Katz**
Citizenship Status	**U. S. Citizen**
Email Address	**f.e.katz@wustl.edu**
Address	**Address** **Street** **2831 Hickory St.** **City** **St. Louis** **State/Territory** **Missouri** **Zip** **63104** **Country** **United States**
Contact Phone Number	**6192776855**

Applicant Education

BA/BS From	**Scripps College**
Date of BA/BS	**May 2013**
JD/LLB From	**Washington University School of Law** **http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014**
Date of JD/LLB	**May 31, 2024**
Class Rank	**I am not ranked**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/ Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations **Just the Beginning Organization**

Recommenders

Harawa, Daniel
dharawa@wustl.edu;dh3544@nyu.edu
240.422.7496
Crum, Travis
crum@wustl.edu
Tamanaha, Brian
btamanaha@wustl.edu
314-935-8242

References

Professor Daniel Harawa | dharawa@wustl.edu | 314-935-4689
Professor Travis Crum | crum@wustl.edu | 314-935-1612
Professor Brian Tamanaha | btamanaha@wustl.edu | 314-935-8242

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Faith Katz, Ph.D.

2831 Hickory Street, St. Louis, MO 63104 | 619-277-6855 | f.e.katz@wustl.edu

July 8, 2023

The Honorable Stephanie D. Davis
Theodore Levin United States Courthouse
231 W. Lafayette Boulevard
Detroit, MI 48226

Dear Judge Davis:

I am a rising third-year student at Washington University School of Law, and I am writing to apply for a clerkship in your chambers, beginning in August 2024 or any term thereafter. Because I aspire to pursue a career as an appellate public defender, a clerkship in your chambers would be an invaluable experience to prepare me to excel in my legal career.

I have acquired a breadth of research and writing skills through a variety of legal internships and clinics focused on indigent defense, including policy work at the Sixth Amendment Center, appellate advocacy through the Post-Conviction Relief Clinic and the Appellate Clinic, trial practice during my internship with the Public Defender Service for the District of Columbia. I continue to grow as an appellate advocate through my current internship with the St. Louis Appellate/PCR Office of the Missouri State Public Defender.

In addition to my legal experience, I have five years of professional experience working on a team of graduate student researchers led by a Principal Investigator, not dissimilar from the working relationship of judges and their clerks. I strive to work in a way that makes my supervisor's job easier, not harder. This experience not only provided the research, writing, and analytical capabilities necessary to succeed in legal practice, but it also gives me a unique lens with which to view legal questions.

Please find enclosed my resume, transcript, writing samples, and letters of recommendation from the following individuals who would also welcome additional inquiries:

Professor Daniel Harawa | dharawa@wustl.edu | 314-935-4689
Professor Travis Crum | crum@wustl.edu | 314-935-1612
Professor Brian Tamanaha | btamanaha@wustl.edu | 314-935-8242

I would love the opportunity to speak with you in more detail about why I would be a great addition to your team. Thank you in advance for your consideration.

Respectfully,

Faith Katz

Encls.

Faith Katz, Ph.D.

2831 Hickory Street, St. Louis, MO 63104 | 619-277-6855 | f.e.katz@wustl.edu

EDUCATION

Washington University School of Law — St. Louis, MO
J.D. Candidate | GPA: 3.67 — May 2024
- Dean's List Spring 2021, Spring 2023
- Maternity Leave Fall 2021

The University of California, San Diego — La Jolla, CA
Ph.D. in Chemistry — Sep 2018
- Published Researcher, Summer Graduate Teaching Scholar, Graduate Teaching Assistant

Scripps College — Claremont, CA
B.A. in Chemistry | GPA: 3.68 — May 2013
- Peer writing tutor, science writing mentor, laboratory teaching assistant

EXPERIENCE

Missouri State Public Defender — St. Louis, MO
Summer Law Clerk, Appellate/PCR Office, St. Louis East A — Jun 2023 – Current
- Drafting two PCR appellate briefs and one direct appeal brief to be submitted this summer

Appellate Clinic — St. Louis, MO
Clinic Student, supervised by Professor Daniel S. Harawa — Jan – May 2023
- Organized, read, and summarized trial transcripts, court opinions, and appellate briefs
- Conducted legal research and submitted a federal habeas appellate brief with a small team

Public Defender Service for the District of Columbia — Washington, D.C.
Summer Law Clerk, Trial Division — Jun – Aug 2022
- Drafted pre-trial filings such as motions and discovery letters
- Conducted legal research and client mitigation research

Post-Conviction Relief Clinic — St. Louis, MO
Clinic Student, supervised by attorneys at Phillips Black, a nonprofit law practice — Jan – May 2022
- Wrote summary of complex procedural history and *Brady* claim for PCR petition

Sixth Amendment Center (6AC) — Boston, MA
Summer Legal Intern — Jun – Aug 2021
- Researched state statutes and upcoming state legislation affecting the right to counsel

The University of San Diego — San Diego, CA
Miramar College, San Diego Community Colleges District — Sep 2018 – Jun 2020
Adjunct Professor of Chemistry
- Coached students in problem-solving skills for general chemistry lecture and lab courses
- Created syllabi, exams, quizzes, and rubrics; graded materials and provided thoughtful feedback

California Innocence Project — San Diego, CA
Volunteer Legal Intern — Jun – Aug 2019
- Responded to requests for assistance from potential clients via phone, email, and mail
- Scanned, read, and analyzed appellate briefs and court opinions as part of prescreen process

SKILLS AND INTERESTS

Excel wizard • Bread baker • Beer brewer

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Office of the University Registrar

Record Of: **Katz, Faith E**
Student ID Number: 491341

Current Programs Of Study:
JURIS DOCTOR

Transcript Issued 06/19/2023 To:

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2020

LEGAL RESEARCH METHODOLOGIES I	LAW	W74 500D	0	CIP
LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (DROBISH)	LAW	W74 500U	2.0	B+
CONTRACTS (BAKER)	LAW	W74 501H	4.0	A-
PROPERTY (D'ONFRO)	LAW	W74 507X	4.0	B+
TORTS (TAMANAHA)	LAW	W74 515D	4.0	A-

Enrolled Units 14.0 Semester GPA 3.57 Cumulative Units 14.0 Cumulative GPA 3.57

Spring Semester 2021

LEGAL RESEARCH METHODOLOGIES II	LAW	W74 500E	1.0	P
LEGAL PRACTICE II: ADVOCACY (DROBISH)	LAW	W74 500Z	2.0	A
CRIMINAL LAW (GARDNER)	LAW	W74 502T	4.0	A
NEGOTIATION (HOLLANDER-BLUMOFF)	LAW	W74 503C	1.0	CR
CIVIL PROCEDURE (LEVIN)	LAW	W74 506	4.0	A-
CONSTITUTIONAL LAW (CRUM)	LAW	W74 520R	4.0	A

Enrolled Units 16.0 Semester GPA 3.81 Cumulative Units 30.0 Cumulative GPA 3.69

Spring Semester 2022

EVIDENCE (HARAWA)	LAW	W74 547N	3.0	A-
SELECT TOPICS IN JUVENILE JUSTICE	LAW	W74 556B	1.0	A
SUPERVISED RESEARCH	LAW	W74 695	3.0	CR
POST-CONVICTION RELIEF CLINICAL PRACTICUM	LAW	W74 801E	6.0	P

Enrolled Units 13.0 Semester GPA 3.69 Cumulative Units 43.0 Cumulative GPA 3.69

Fall Semester 2022

CRIMINAL PROCEDURE: INVESTIGATION (GARDNER)	LAW	W74 542M	3.0	B-
ETHICS AND PROFESSIONALISM IN THE PRACTICE OF LAW (PRATZEL)	LAW	W74 562C	2.0	A-
RACE & THE LAW (DAVIS)	LAW	W74 608F	3.0	B+
FEDERAL COURTS (HOLLANDER-BLUMOFF)	LAW	W74 634G	4.0	PW
JURISPRUDENCE SEMINAR (TAMANAHA)	LAW	W76 796S	3.0	A

Enrolled Units 15.0 Semester GPA 3.50 Cumulative Units 54.0 Cumulative GPA 3.64

Spring Semester 2023

THE LAW OF THE FOURTEENTH AMENDMENT (CRUM)	LAW	W74 609T	3.0	A-
EDUCATION EQUALITY, EQUITY AND FAIRNESS: K-12 (NORWOOD/ST. OMER)	LAW	W74 718E	3.0	B+
APPELLATE CLINIC (HARAWA)	LAW	W74 800B	6.0	HP

Keri A. Disch, University Registrar

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Record Of: **Katz, Faith E**
Student ID Number: 491341

Spring Semester 2023

APPELLATE CLINIC - CREDIT LAW W74 800C 2.0 CR

Enrolled Units 14.0 Semester GPA 3.76 Cumulative Units 68.0 Cumulative GPA 3.67

Remarks

FL2021 LEAVE OF ABSENCE
SP2022 NOTE: SUPERVISED RESEARCH (PROF. HARAWA): RACIAL ANALYSES IN CRIMINAL LAW

Distinctions, Prizes and Awards

SP2021 DEAN'S LIST
SP2023 DEAN'S LIST

********** **END OF TRANSCRIPT** **********

Keri A. Disch, University Registrar

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Washington University in St. Louis
Office of the University Registrar
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Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations

AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

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Washington University in St. Louis
SCHOOL OF LAW

February 17, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Faith Katz

Dear Judge Davis:

I am thrilled to recommend Faith Katz for a clerkship in your chambers. I am an associate professor and director of the appellate clinic at Washington University in St. Louis School of Law. I have been fortunate to get to know Faith in a variety of capacities: as my research assistant, as a student in my large Evidence course, and as a clinic student. In all settings, Faith has excelled. I cannot imagine a better law clerk. I provide her my highest recommendation.

Faith was more than a research assistant; she was a thought partner. From the start, Faith proved herself to be a gifted student with an enviable aptitude for processing and organizing large volumes of information. Faith had the ability to listen carefully during what would often be wide-ranging conversations, and from there, develop a full research plan with very little direction. She also had the uncanny capacity to find the most telling insight into the material with which she was working. Faith was able to sharpen my thinking on a number of issues, and surface issues I had not even contemplated. Her views were always incisive, well-informed, and worth seriously contemplating. I greatly benefited from Faith's sheer intellectual power.

In Evidence, Faith also stood out. In a class of 90 students, it is somewhat hard to make an impression. But Faith did just that. Faith did not just raise her hand for the sake of it; whenever she spoke, she made a meaningful contribution to classroom discussions. What I found most impressive about Faith's contributions was how she was able to draw on her prior experience as a scientific researcher and apply that knowledge to evidence law. Her unique background gave her special insight into a variety of evidentiary conversations, especially evidence law surrounding expert testimony. The classroom was enriched by her presence.

Now, as a clinic student, Faith is a star. Faith has spent her law school career honing her indigent defense skills; in the clinic, she is working on a complicated habeas case. Faith is diligent in pursuing every research avenue. She takes the time to make sure she has thoroughly digested the entire record (which is voluminous). And she centers the client in all that she does. Faith's attention to detail, the care with which she sifts through information, and her ability to puzzle through difficult questions, yet seek guidance when needed, is remarkable. I know Faith will be an amazing public defender one day.

On a personal note, Faith is also wonderful to work with. Conversations with Faith flow so easily that an hour goes by and you hardly notice. Whether discussing complex legal arguments or favorite pastimes, conversations are never forced. Faith is warm and engaging with a mature perspective and great sense of humor.

As you can see from her application materials, Faith has compiled a remarkable record at WashULaw, all while being a new mother. Faith is well liked and respected by both the faculty and her peers, and yet Faith manages to carry herself with an unassuming humility. I look forward to following what will be an amazing career.

For all these reasons, Faith will be a stellar law clerk. I fully understand the demands of a clerkship; Faith will be more than up to the challenge. I also know the intimacy of the chambers working environment; Faith is the type of person you want working by your side on difficult legal questions late in the day.

I highly recommend Faith without any reservation. If I can be of further assistance, please feel free to contact me.

Best,

/s/

Daniel S. Harawa
Director, Appellate Clinic
Assistant Professor of Practice

Daniel Harawa - dharawa@wustl.edu;dh3544@nyu.edu - 240.422.7496

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Daniel Harawa - dharawa@wustl.edu;dh3544@nyu.edu - 240.422.7496

Washington University in St. Louis
SCHOOL OF LAW

February 3, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Faith Katz

Dear Judge Davis:

I'm writing to recommend my student, Faith Katz, who has applied for a clerkship in your chambers. As someone who clerked at all three levels of the federal judiciary, I am confident that Faith will be a great law clerk. She has my strong recommendation for your chambers.

I first got to know Faith when she took my Constitutional Law class in Spring 2021, which was in a hybrid-learning format due to the pandemic. Many students found that format challenging. But Faith thrived. She was always prepared for cold calls, including one of the very first of the semester on Marbury v. Madison. She actively participated in class discussion, often staying behind on the Zoom-only days to ask follow-up questions and debate issues with her fellow students. Based on her anonymously graded exam and her class participation, she earned an A in the course.

Faith is currently enrolled in my Law of the Fourteenth Amendment class, which focuses on hot-button topics like racial discrimination and abortion. In our classroom discussions, she has approached these topics with a lawyerly eye for nuance. I have been particularly impressed by Faith's understanding of the connections between equal protection and substantive due process in the Court's right to marry jurisprudence.

Unlike many lawyers, Faith has a wealth of knowledge in the hard sciences. Prior to law school, she earned a PhD in Chemistry and was publishing academic papers as an adjunct professor. That experience still shapes her career, and she seeks to bring that expertise to criminal justice reform.

Indeed, Faith is already on that path. She has spent her summers interning at DC's Public Defender Service and the Sixth Amendment Center. Here at WashULaw, she participated in our Post-Conviction Relief Clinic and is now in our Appellate Clinic. Many law students are still sampling the buffet of options that law school offers, but Faith is rapidly developing her specialty.

Right after law school, Faith wants to serve as a public defender for several years. And I predict that she'll become a terrific advocate for her clients. But her horizons are broader than direct representation. Her long-term goal is to draw on her PhD in chemistry to help reform forensic analysis in the criminal justice system. We have repeatedly talked about her ideas to have lawyers and scientists collaborate on this important issue. I would not be surprised to learn that Faith was leading an important initiative on forensic justice at the Innocence Project or similar organization ten years from now.

In my interactions with Faith, she has come across as professional, funny, and intellectually curious. She is clearly driven to make a positive change in the world. I have no doubt that she will help make chambers a friendly and pleasant place to work.

Please feel free to call or e-mail me if I can offer any further information. I can be reached at my office at 314-935-1612 or on my cell at 240-446-6705.

Best,

/s/

Travis Crum
Associate Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Travis Crum - crum@wustl.edu

Washington University in St. Louis
SCHOOL OF LAW

February 7, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

RE: Recommendation for Faith Katz

Dear Judge Davis:

Ms. Faith Katz is a highly capable law student and will be an excellent law clerk. She is different in several respects from the majority of law students applying for a judicial clerkship, and I hope to show that her unusual background should count in her favor.

Prior to law school, she earned a B.A. and PhD. in Chemistry, and then taught Chemistry at a local college as well as published research in the field. While teaching, Ms. Katz also became involved as a volunteer in the California Innocence Project, applying her knowledge to help evaluate scientific evidence in cases. Following these experiences, she decided to attend law school and dedicate herself to helping insure the fairness of our criminal justice system. Ms. Katz had a baby during the first year in law school, took a semester off for maternity leave, and is now raising the child while carrying a full time course load.

This personal background reveals core aspects of her ability and character. Ms. Katz is highly intelligent (Chemistry is notoriously difficult) and broadly educated, and she has advanced research and writing ability (more on this shortly). She is mature and responsible, capable of juggling multiple demanding commitments. And she is committed to making a positive difference to our society. For these reasons, she is an ideal candidate for a judicial clerkship.

Ms. Katz was a student in my Torts class in 2020, and in my Jurisprudence Seminar last fall. Torts was a hybrid class with 45 students in total, about two-thirds of whom attended in-person, and the other third by Zoom (students had the option). Although I do not recall much about the class (which was several years ago), one of the few things I remember well is that I was grateful that Ms. Katz attended the class in-person because I came to rely on her for pedagogical purposes. It was evident from the answers she provided that she was very smart, poised, and invariably prepared. Throughout the semester, I would regularly call on her whenever I wanted to get the correct answer to move the discussion forward.

Her intelligence again stood out in my Jurisprudence class last semester. The course covers major topics in legal theory: the nature of law, natural law, liberal theory (Locke, Mill, Rawls), the rule of law, law and economics, critical theory, and other issues. It is a challenging class. The students who enroll are among our highest performing second and third year students. The readings are lengthy and complex, and students are required to write four papers in the course of the semester on the topics covered. The essays are marked anonymously, and graded for writing, organization, and theoretical sophistication. Here is a sampling of comments I wrote on Ms. Katz's papers: "Ambitious," "smart," and "creative;" "Excellent intro!" Her final paper was among the best I have read in several years, as my comments suggest: "Superb writing. Excellent critique. I learned from your essay. Thanks!" This is rare praise from me.

To get a sense of Ms. Katz's ability, it helps to see her achievements in context. Washington University Law School is ranked 16th nationally, and the median LSAT of her class was in the top 3 percent of test takers nationwide. Many of our students have been admitted to law schools ranked in the top 10 nationally, but they attend WashULaw owing to generous scholarships we offer to attract top students. Thus, Ms. Katz is doing well overall among a very talented group of students, and she has written one of the best student essays I have read. There is no doubt that she is extremely capable and will perform the work of a law clerk at the highest level.

Ms. Katz is seeking a judicial clerkship because she wants to understand how judicial decisions are made and how the court system operates, providing her with a fuller understanding of law and set of legal skills. She plans to work as a public defendant following graduation, utilizing her legal and scientific training to advance the fairness of our criminal justice system. The clerkship experience will not only personally benefit Ms. Katz by enhancing her ability to serve as an advocate, but also will benefit the legal system generally.

On a personal level, Ms. Katz is amiable, respectful, and responsive to critical feedback, and she will be easy to get along with in chambers. Ms. Katz will be an excellent law clerk, and will make the most of the opportunities that a clerkship provides. If you

Brian Tamanaha - btamanaha@wustl.edu - 314-935-8242

have any questions, please email (btamanaha@wustl.edu) or call me (cell 718 930 2817).

Best,

/s/

Brian Z. Tamanaha
John S. Lehmann University Professor

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Writing Sample

Below is my final writing assignment from my second semester of legal writing (Legal Practice II). I wrote this in the Spring of my 1L year (Spring 2021). My professor created a hypothetical scenario in which a Mr. Schwick had been convicted of murder in federal court and was appealing his conviction in the Ninth Circuit. I was assigned to represent the U.S. on appeal and defend the conviction.

Docket No. 21-015

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

J. RANDY SCHWICK,

Appellant.

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA,
THE HONORABLE STACEY STEELE, DISTRICT JUDGE

BRIEF OF APPELLEE

TABLE OF CONTENTS

STATEMENT OF THE ISSUE

Whether the District Court correctly denied the defendant's motion to suppress an eyewitness identification, under the reliability test for eyewitness identifications required to protect a defendant's Fifth Amendment right to due process, when, though the eyewitness identified the defendant from a lineup after law enforcement reminded her of her prior statement about the assailant's piercing, her attention was heightened during the crime, her initial description of the assailant closely matches the appearance of the defendant during the lineup, and she never identified anyone else as the killer.

STATEMENT OF THE CASE

Bureau of Alcohol, Tobacco, and Firearms ("ATF") Agent Ricky Rogers was fatally stabbed at Tipplers Tavern. (R. 4.) Jenna Steffenson, who was working at Tipplers Tavern the night of the murder, identified Defendant J. Randy Schwick as Rogers's killer. (R. 8.) Schwick was indicted for the murder. (R. 6.) Schwick then moved to suppress the identification evidence claiming admission would violate his constitutional due process rights. (R. 7-8.) The District Court denied the motion to suppress. (R. 20.) A jury convicted Schwick of second-degree murder. (R. 21.) On appeal, Schwick argues his conviction should be reversed because the District Court erred in denying his motion to suppress. (R. 23.)

At the motion to suppress hearing, Steffenson testified fights at the bar are common, so she only began paying attention to a fight that night once she heard someone shout that they were an ATF agent. (R. 8-9.) She stated this individual then held up a badge and again declared he was an ATF agent. (R. 9.) Steffenson recalled she was "maybe ten, twelve feet" away from the victim and his assailant. (R. 9.) She asserted she "got a good, long look at that killer" for at least twenty seconds. (R. 14.)

Hours after the murder, Steffenson described the killer to Agent Genkov as "tall-over six feet, but not more than six foot three . . . rail thin, like a bean pole," with a thick black mustache and a silver stud in his nose. (R. 11.) Schwick was

6'4" and weighed 205 pounds when Steffenson picked him out of a six-man lineup three weeks after the murder. (R. 13, 17.) During the lineup, when Steffenson did not immediately select anyone, Agent Genkov asked if anything would help refresh her recollection. (R. 13.) Steffenson could not think of anything, so Agent Genkov then asked Steffenson if Steffenson remembered what she had previously said about the assailant's piercing on the night of the murder. (R. 13.) Three men in the lineup had visible piercings. (R. 13.) Steffenson then remembered the killer had a silver stud in his nose and identified the defendant, Schwick, as Rogers's killer. (R. 14.) Steffenson said she was "75% sure" it was him. (R. 14.)

ARGUMENT

I. Standard of Review

On appeal, the constitutionality of pretrial identification procedures is reviewed *de novo*. *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir. 1998).

II. The District Court Correctly Admitted Eyewitness Identification Evidence Because, Even Though Law Enforcement's Procedure Was Suggestive, the Identification Is Still Reliable

Because it "typically falls within the province of the jury" to determine the "reliability of relevant testimony," *Perry v. New Hampshire*, 565 U.S. 228, 232 (2012), due process requires eyewitness identification evidence be excluded *only* if the identification procedure is "so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification," *Simmons v. United States*, 390 U.S. 377, 384 (1968). In evaluating the constitutionality of admitting eyewitness identifications, courts examine whether the identification procedure was suggestive, and if so, whether the identification is nonetheless reliable, *United States v. Love*, 746 F.2d 477, 478 (9th Cir. 1984), since reliability "is the linchpin in determining the admissibility of identification testimony," *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977).

Reliability is judged by examining the "totality of the circumstances" surrounding the identification to determine whether indices of reliability outweigh

the "'corrupting effect of the suggestive identification itself.'" *United States v. Field*, 625 F.2d 862, 866 (9th Cir. 1980) (quoting *Manson*, 432 U.S. at 114). The Supreme Court has described five indices of reliability, often called the *Biggers* factors:

> the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199-200 (1972). Assessing the totality of the circumstances in this case, the indices of reliability far outweigh any corrupting effect of the suggestive lineup procedure, so the District Court correctly admitted Steffenson's identification.

Here, the totality of the circumstances is assessed through the five *Biggers* factors, followed by a comparison of suggestiveness to reliability. The first two *Biggers* factors are analyzed together because both assess the circumstances under which the witness saw the assailant. Though Steffenson had only a brief opportunity to view the assailant in a poorly lit area, her attention during the crime was heightened once the victim shouted that he was a federal agent, indicating her identification is reliable. Turning to the third *Biggers* factor, Steffenson's identification is accurate because her prior description of the assailant as tall and skinny, with a black mustache and a nose piercing, matches the appearance of

Schwick when identified. In examining the witness's level of certainty, the fourth *Biggers* factor, it is crucial that Steffenson never identified anyone other than Schwick and identified him at her first opportunity, since these facts indicate certainty even though she was only 75% sure of her identification. The fifth *Biggers* factor, the time between the crime and identification, may favor reliability, since Steffenson identified Schwick three weeks after the crime, so her memory may have still been fresh. Taken together, the above indices of reliability far outweigh the slight corrupting effect of the suggestive procedure in which Agent Genkov inadvertently emphasized three individuals in the lineup in an attempt to refresh Steffenson's memory.

A. The Identification Is Reliable Because, Though Steffenson Had a Brief Opportunity to View the Assailant, Her Awareness Was Heightened by an Unusual Event

A witness's opportunity to view, the first *Biggers* factor, suggests reliability when the amount of time the eyewitness spent observing the assailant is sufficiently long, the distance between the witness and assailant is sufficiently short, and the area of observation is well-lit. *See, e.g.*, *Field*, 625 F.2d at 868 (observation for a few seconds from twenty feet away together weighed against reliability). *See also United States v. Barron*, 575 F.2d 752, 755 (9th Cir. 1978) ("well-lighted bank in daytime" favored reliability).

The second *Biggers* factor, a witness's degree of attention, indicates reliability if something sufficiently unusual about the incident causes the witness to have a heightened degree of attention. *Compare Green v. Loggins*, 614 F.2d 219, 224 (9th Cir. 1980) (no heightened degree of attention when the witness "had been merely a casual observer of the activity in the restaurant") *with Biggers*, 409 U.S. at 200 (sufficiently heightened degree of attention when eyewitness was a victim and not a mere witness, who saw her rapist face-to-face in an intimate and humiliating way).

Taken together, Steffenson's identification is reliable because, even though she saw the assailant for a short time, in a dimly lit environment, from a moderate distance, she had an extremely heightened awareness because the victim had just shouted that he was a federal agent in a biker bar. Though she was about ten feet away from the assailant at the time of the stabbing, and only saw him for twenty seconds in a dimly lit bar, identifications under similarly poor conditions have been upheld when other factors of reliability are present. *See, e.g.*, *United States v. Simoy*, 998 F.2d 751, 753 (9th Cir. 1993) (witness saw assailant from forty-five feet away for five seconds in a dark area). Counterbalancing the sub-optimal viewing circumstances in this case is Steffenson's heightened attention during the crime because it is extremely unusual for someone at Tipplers Tavern to yell out that they are an ATF Agent, let alone flash a badge and yell it twice. Steffenson

testified that when she heard someone yell that they were an AFT Agent, she immediately began paying attention to the altercation, which is a sufficiently unusual event to heighten her awareness even though she was not a victim. *Cf. Montgomery*, 150 F.3d at 993 ("because the large order for a key methamphetamine ingredient raised [the witness's] suspicions, he made a point of gaining a detailed description of the purchaser," so the identification was deemed reliable, even though other factors weighed against reliability). Thus, the highly unusual event of a federal agent announcing his presence in a biker bar suggests Steffenson's awareness was heightened during the crime and her identification is reliable, notwithstanding the sub-optimal viewing conditions.

B. The Identification Is Reliable Because Steffenson's Prior Description Was Specific and Correct

The third *Biggers* factor evaluates whether the witness's prior description is accurate by examining, first, whether it is sufficiently *specific* in that it mentions prominent, unique features of the criminal, and second, whether it is sufficiently *correct*, in that it closely matches the actual appearance of the person later identified. *See Ponce v. Cupp*, 735 F.2d 333, 336–37 (9th Cir. 1984) (suggesting a specific initial description and one that closely matched the actual appearance of the defendant were both relevant to accuracy).

Steffenson's identification is reliable because she described three prominent, unique features of the assailant that correctly describe the appearance of Schwick

when picked him out of the lineup. The three traits she mentions, a black mustache, a nose piercing, and that the assailant was "rail thin, like a bean pole," are comparable to other descriptions that have been deemed "very specific." *See id.* (curly brown hair, a mustache, straggly beard, five-foot ten to five-foot eleven, approximately 140 pounds, and a gold earring was "very specific"). Furthermore, her initial description was also *correct*, since, at the time of his arrest, Schwick was tall and skinny, with a black mustache and a nose piercing. *Cf. Tomlin v. Myers*, 30 F.3d 1235, 1241–42 (9th Cir. 1994) (witness identification was likely unreliable because she initially described the assailant as having "an inch and a half to two-inch afro" but picked out of the lineup someone with "a shoulder-length, straightened permanent hair style"). Though Schwick is six-foot four and Steffenson estimated he was between six-foot and six-foot three, even large height discrepancies are generally excusable errors when the other details of the description are correct. *See, e.g.*, *United States v. Drake*, 543 F.3d 1080, 1089 (9th Cir. 2008). Thus, Steffenson's identification is reliable because her initial description was sufficiently detailed and that description is a sufficiently correct description of Schwick.

C. The Identification Is Reliable Because Steffenson Did Not Identify Anyone Other Than the Defendant and Identified Him at Her First Opportunity

The fourth *Biggers* factor assesses witness certainty by examining whether the witness has previously identified any other person and whether the witness identified the defendant as the assailant at their first opportunity. *Compare Barron*, 575 F.2d at 755 ("There is no indication here that any witness has ever selected any other suspect.") *with Green*, 614 F.2d at 224 (witness identification was unreliable in part because he initially identified someone other than the defendant as the assailant, even after viewing a picture of the defendant). Additionally, courts can consider whether the witness self-reports their certainty with sufficient confidence, though absolute certainty is not required. *See Simoy*, 998 F.2d at 752–53. Self-reports of certainty should be weighed with caution, since they may simply "reflect the corrupting effect of the suggestive procedures." *Rodriguez v. Young*, 906 F.2d 1153, 1163 (7th Cir. 1990).

While Steffenson stated she was only 75% of her identification after choosing Schwick, her identification is still reliable because this self-assessment is outweighed by the facts that she never identified anyone other than Schwick and identified Schwick at her first opportunity. *Cf. Simoy*, 998 F.2d at 752–53 (identification was reliable despite witness stating he was not 100% sure because other indices of reliability were present).

D. The Identification Is Not Unreliable Because Steffenson's Memory May Have Still Been Fresh Three Weeks After the Crime

The fifth *Biggers* factor measures the length of time between the crime and the identification to determine whether the memory of the witness is still fresh and thus reliable. *See Simmons*, 390 U.S. at 385 (witness identifications were reliable in part because when shown photographs one day after the crime occurred, "their memories were still fresh"). Time periods up to three weeks have been considered short enough for a witness's memory to still be fresh. *See id.* (one day); *United States v. Sanchez*, 988 F.2d 1384, 1390 (5th Cir. 1993) (one and one-half weeks); *United States v. Traeger*, 289 F.3d 461, 474 (7th Cir. 2002) (three weeks). In contrast, three months or longer is generally too long for a witness's memory to still be fresh and weighs against reliability. *See Green*, 614 F.2d at 225 (three months); *Biggers*, 409 U.S. at 201 (seven months).

Steffenson's identification is not unreliable simply because she picked Schwick out of a lineup three weeks after the crime. Because this time period is at the upper limit of short time spans that suggest a fresh, reliable memory, it may be more prudent to call three weeks "not unreasonably long." *Dodd v. Nix*, 48 F.3d 1071, 1074 (8th Cir. 1995). At worst, three weeks is a moderate amount of time that cannot weigh in favor of or against reliability, and, at best, the three-week time period can weigh slightly in favor of reliability because Steffenson's may still have been fresh after three weeks.

E. The Identification Is Reliable Because the Evidence of Reliability Outweighs the Corrupting Effect of the Minimally Suggestive Lineup Procedure

An identification procedure is suggestive when it focuses the witness's attention on a *single* individual. *E.g.*, *Montgomery*, 150 F.3d at 992. "Even if the procedure was unnecessarily suggestive, use of the evidence is appropriate if sufficient indicia of reliability are present." *United States v. Johnson*, 820 F.2d 1065, 1072–73 (9th Cir. 1987) (cleaned up). With sufficient indicia of reliability, even showups, in which police show a witness only a *single* individual, have been deemed constitutional. *See, e.g.*, *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir. 1996) (defendant was in a police car in custody when witnesses were slowly driven by the police car and asked whether the defendant was the assailant).

In this case, the procedure was only minimally suggestive and does not overshadow the numerous indices of reliability because, while Agent Genkov's question about a piercing narrowed Steffenson's focus to the three individuals in the lineup with visible piercings, it did not narrow her focus to a *single* individual. Furthermore, the suggestive procedure here is much less egregious than other identification procedures this Court has allowed. *See, e.g.*, *Johnson*, 820 F.2d at 1073 (identification was constitutional even though the witness, unable to identify the assailant from a photo array, later picked the defendant out of a lineup in which the defendant was the only person who appeared in both the photo array and the

lineup). The corrupting effect in this case is also slight compared to the rare examples this Court has actually held violate a defendant's due process rights. *See, e.g.*, *Field*, 625 F.2d at 869 ("The agent told [the witness] that his selection was wrong, and [the witness] then selected [the defendant's] photograph.").

CONCLUSION

The District Court correctly denied Schwick's motion to suppress Steffenson's eyewitness identification because admission of the evidence did not deprive him of due process. Though the lineup procedure was somewhat suggestive, since Agent Genkov narrowed Steffenson's focus to three of the six individuals in the lineup, Steffenson's eyewitness identification is nevertheless reliable, since her attention was heightened when Rogers said he was a federal agent, her description of a tall, skinny man with a black mustache and a nose piercing closely matches the appearance of Schwick, and she never identified anyone else as the perpetrator.

Writing Sample 2

Below is one of the 5-page legal philosophy papers I wrote for Jurisprudence Seminar in Fall 2022. The reading assigned on feminist theory and law was an excerpt from Leslie Bender's "A Lawyer's Primer on Feminist Theory and Tort," 38 *J. Legal Education* 3 (1988). For my final writing assignment in this course, I chose to critique Bender's work.

Faith Katz Jurisprudence Seminar Fall 2022

Feminist Critiques of Bender's Proposed Negligence Standard of Care

Leslie Bender, in her piece, "A Lawyer's Primer on Feminist Theory and Tort," attempts to 1) introduce the legal community to feminism, and 2) demonstrate the power of a feminist viewpoint to enhance legal analysis by applying feminist theory to her own area of expertise, tort law.[1] She criticizes the reasonable person standard in negligence law as an implicit male norm and proposes a feminine ethic of care instead, one of "conscious care and concern of a responsible neighbor."[2] By identifying as a feminist yet eschewing labels for different schools of feminist thought, however, she fails to accomplish either of her stated goals. This paper will, first, introduce four main schools of feminist thought, and second, place them in conversation with one another to critique Bender's proposed standard of care.

Feminist philosopher Alison Jaggar, in her seminal work, "Feminist Politics and Human Nature," describes four major streams of feminist thought: 1) liberal feminism, 2) Marxist feminism, 3) radical feminism, and 4) socialist feminism.[3] Liberal feminists trace their roots to liberal political theory and blame the social construction of gender for women's oppression.[4] Because women have just as capable minds as men, they believe individual rights should be granted to men and women equally, notwithstanding the physical differences between male and female.[5] Liberal feminists work for women to receive equal treatment to men under the law and equal access to men to opportunities such as jobs, credit, political participation, and more.[6] Marxist feminists, in contrast, primarily blame capitalism for women's oppression.[7] They believe

[1] Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 *J. Legal Educ.* 29 (1988).
[2] *Id.* at 31.
[3] Alison Jaggar, *Feminist Politics and Human Nature*, Totawa, N.J., (1983). Interestingly, Bender cites to this book in a footnote as "a work that carefully catalogues and explains various feminist themes," but nevertheless refuses to utilize Jaggar's ubiquitous categories.
[4] *See id.* at 38.
[5] *See id.* at 37.
[6] *See id.* at 35.
[7] *Id.* at 65.

only by ending capitalism can women truly be free, and they are generally more critical of systems and institutions than their liberal feminist counterparts. Radical feminism is a broad category that encompasses many and sometimes conflicting views about women's oppression, but what radical feminists have in common is a refusal to adhere to a single political theory.[8] Some see men as the cause of women's oppression. Instead of abolishing gender distinctions, however, as liberal feminists might desire, these radical feminists think the key to women's liberation is to embrace and celebrate the inherent qualities of women.[9] Finally, Jaggar describes socialist feminism, which may be better understood today as intersectional feminism. Explicitly identifying as a socialist feminist, Jaggar explains socialist feminists believe "capitalism, male dominance, racism and imperialism are intertwined so inextricably that they are inseparable; consequently the abolition of any of these systems of domination requires the end of all of them."[10]

None of this nuance can be deciphered from Bender's introduction to feminism. In her introduction, she says, "there are many feminisms, all with distinctive priorities. Although their strategies for bringing about change may vary, each focuses on women and matters that concern women, particularly women's oppression and its elimination."[11] This is either ignorant or intentionally deceptive, for it is not *just* their strategies that vary. Each of the four streams of feminism described above have vastly different understandings of the *cause* of women's oppression. They do not just have different ideas about *how* to change society, they also have extremely different, often incompatible, ideas about *what* in society ought to be changed. Then, over the course of four sentences, she describes Jaggar's four categories of feminism but without

[8] *Id.* at 84.
[9] *Id.* at 95.
[10] *Id.* at 124.
[11] Bender (1988) at 5.

ascribing any labels to them."[12] She is clearly aware of these categories but declines to fully educate her readers. Finally, toward the end of this paragraph, Bender asserts, "There is, however, a coherence to feminism that overrides the differences."[13] Whether intentional or not, this presentation of feminism deludes readers into believing that all feminists have a unified vision of the good society, the differences among feminists are trivial, and there exists a single feminist viewpoint that can critique legal areas like tort law. In fact, there are at least four distinct and valuable feminist voices that can critique an area of law, and a much richer analysis comes from treating them as separate rather than collapsing them into one generic "feminism." Bender identifies as a feminist throughout this piece but refuses to reckon with the contradictory voices within the broad umbrella of "feminism."[14] Because of this, she leaves the reader with the false impression that her proposal would be universally applauded by all who call themselves feminists.[15]

A liberal feminist would likely take issue with the "conscious care and concern" proposal because removing reason from the standard is a concession that reason is masculine. It is also an endorsement of the social construction that feminine means caring. Because liberal feminists see

[12] *Id.* at 5. "Some feminists believe that open access to the male world … will solve the problem" is a description of liberal feminism. "Others believe that the experience of women's subordination will not be resolved without fundamental changes in our institutions and power structures" is an intentionally vague description of Marxist feminism. "Many feminists believe that problems of gender cannot be successfully confronted in isolation but must be coordinated with analyses of other kinds of oppression, such as class and race" is a description of socialist feminism. Finally, "Still other feminists study differences, understanding that because difference is relational and not an attribute of one person or thing it must not be used to justify hierarchies of power" is an attempt to consolidate the various viewpoints within Jaggar's category of "radical feminism."

[13] *Id.*

[14] *See, e.g.*, *id.* at 3 ("We are characterized as bitchy"); *see also id.* at 4 ("We study women's oppression").

[15] *See, e.g.*, *id.* at 32 ("the feminine voice can design a tort system that encourages behavior that is caring about others' safety and responsive to others' needs," suggesting there is a singular feminine voice and when it speaks, it endorses Bender's proposed standard of care); *see also id.* at 37 ("The same method can be used to examine many other aspects of negligence and tort law," implying that the standard of care concept has been fully examined by feminism and there is no other feminist analysis of standard of care to uncover).

these types of gender stereotypes as the cause of women's oppression, they would be unwilling to enact change by enshrining these assumptions even further into the law.

Alternatively, a radical feminist might reject the idea because they believe that the problem with the reasonable person standard is not its male orientation but the idea that there can be a universal standard of care at all when men and women are so different. Since a radical feminist is likely to focus on the differences between men and women, they may suggest a reasonable man standard and a separate reasonable woman standard, to be applied when women are defendants in negligence suits. Alternatively, they may suggest retaining the reasonable man standard and adopting some version of Bender's care and concern standard for women.

A socialist feminist might take this one step further to highlight the absurdity of creating multiple standards of care by suggesting that, if there will no longer be a single universal standard, why stop at just two standards? Given that people raised in non-Western cultures might have different ideas about what constitutes being a caring neighbor, there should be a standard of care for Western men, a different one for Western women, a third for non-Western men, and a fourth for non-Western women. The same argument could be made for people of color, non-binary folks, and more, to the point where every person would be entitled to their own, unique standard of care on account of their unique set of characteristics. The real problem, according to a socialist feminist, might not be that the legal standard is masculine but that the legal profession is masculine. In particular, most judges tasked with applying the reasonable person standard are wealthy, Western-raised, white, middle-aged, cis-hetero men. So long as the composition of the courts remains unrepresentative of society at large, the standard, no matter what it is, will never be applied in an equitable way. The composition of the judiciary is the product of centuries of structural racism, sexism, and classism, among other -isms. To the socialist feminist, then, the

solution to a male-oriented legal standard may be to work for systemic changes in legal education, politics, and law, which can increase the percentage of historically underrepresented groups on the bench.

Finally, a Marxist feminist may define the problem differently still. Initially, one might hypothesize that Marxist feminists might be drawn to Bender's heightened standard of care based on "conscious care and concern" because it rejects the liberal individualism of the reasonable person standard in favor or a more communitarian approach to negligence. However, the Marxist feminist would likely see her proposal as insufficient to remedy oppression of women in negligence law. Going further than other feminists, though, they would likely reject the entire premise of addressing harm through negligence lawsuits in favor of a more communal response to harm, one in which everyone in the community contributes, and people are able to access whatever resources they need when they are injured by the negligence of another community member.[16]

All feminists would probably agree that the current structure of negligence suits and tort law is not ideal. They might also all agree that the shortcomings tend to hurt women more than men. This, however, may be where agreement ends. When the streams of feminist thought are disaggregated, a much richer, more beneficial analysis emerges. I do not claim to know the "correct" answer to the problem of the reasonable person standard that Bender unearths. All I know is that "feminism" yields more than one answer.

[16] I do not have a good cite for this other than my 1L Torts notes, but I will never forget when Professor Tamanaha challenged us to think of other ways besides lawsuits to compensate victims. He specifically mentioned the social insurance system in New Zealand and likened it to the worker's compensation system in the U.S.

Applicant Details

First Name	**So Jung**
Last Name	**Kim**
Citizenship Status	**U. S. Citizen**
Email Address	**sjmkim@uchicago.edu**
Address	**Address** Street **5493 S Cornell Ave, Apt 217** City **Chicago** State/Territory **Illinois** Zip **60615** Country **United States**
Contact Phone Number	**5109653678**

Applicant Education

BA/BS From	**University of Michigan-Ann Arbor**
Date of BA/BS	**April 2018**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 3, 2023**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**University of Chicago Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**Yes**

Specialized Work Experience

Recommenders

Masur, Jonathan
jmasur@uchicago.edu
773-702-5188
Templeton, Mark
templeton@uchicago.edu
773-702-9494
Nou, Jennifer
jnou@uchicago.edu
773-702-9494

This applicant has certified that all data entered in this profile and any application documents are true and correct.

SO JUNG MADELINE KIM
5493 South Cornell Avenue Apt. 217, Chicago, IL 60615 | 510-965-3678 | sjmkim@uchicago.edu

June 24, 2023

The Honorable Stephanie Dawkins Davis
United States Court of Appeals for the Sixth Circuit
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I am a recent graduate from the University of Chicago Law School applying for a clerkship in your chambers for the 2024–25 term. I want to stay in the Sixth Circuit to build upon my circuit-specific knowledge, which I will develop as a law clerk to Judge Berg in the Eastern District of Michigan starting this fall.

My long-term goal is to enter government service as an enforcement attorney, which I have confirmed through federal agency internships. To me, a judicial clerkship is the ideal training ground for that path and a unique mode of public service. As the daughter of an immigrant scientist, I know the value of hands-on time spent in the lab and working as an "apprentice," so this is exactly the practical experience I crave early in my career. I want to immerse myself in the thorny, first-impression legal issues that rise to our circuit courts, observe oral arguments, and deepen my working knowledge of appellate procedure. My first hands-on taste of these was in my school's moot court competition, and I am eager to learn more.

I welcome the opportunity to discuss my qualifications and how I could be an asset to your chambers. For example, during my two years with the Abrams Environmental Law Clinic, I have closely collaborated with my student teammates, professors, and grassroots clients to develop our legal strategy and work product.

My resume, writing sample, and transcript are enclosed. Letters of recommendation from Professors Jennifer Nou, Jonathan Masur, and Mark Templeton will arrive under separate cover. Thank you for your consideration.

Respectfully,

So Jung Kim

SO JUNG MADELINE KIM

5493 South Cornell Avenue Apt. 217, Chicago, IL 60615 | 510-965-3678 | sjmkim@uchicago.edu

EDUCATION

The University of Chicago Law School, Chicago, IL
J.D., June 2023
Journal: The University of Chicago Law Review
Honors: 2022 Asian American Bar Association of Greater Chicago Law Foundation Student Scholarship, Ann Watson Barber Outstanding Service Award, Pro Bono Honors
Activities: Asian Pacific American Law Students Association, Peer Advisor, Pro Bono Board

University of Michigan, Gerald R. Ford School of Public Policy, Ann Arbor, MI
B.A. with Distinction in Public Policy, April 2018
Honors: Phi Beta Kappa, Ford School Peer-Elected Commencement Speaker
Activities: The Michigan Daily Student Newspaper, Vice President for Student Life Advisory Board, Michigan in Washington Semester, America Reads Literacy Tutor

PROFESSIONAL EXPERIENCE

U.S. District Court for the Eastern District of Michigan, Detroit, MI, Law Clerk for The Honorable Terrence G. Berg, Expected Aug 2023–Aug 2024

Abrams Environmental Law Clinic, Mandel Legal Aid Clinic, Chicago, IL, Student, Sept 2021–May 2023
- Submitted discovery questions, drafted expert witness testimony, drafted briefs, and participated in settlement to represent grassroots clients advocating for energy justice in five state regulatory cases such as a prepayment program, ratemaking, solar renewable pilot, and integrated resource planning
- Cross-examined a utility company's witness about customer rate impacts under attorney supervision
- Led student sub-team by managing project timelines and revising early drafts of work product

U.S. Department of Justice, Antitrust Division, Chicago, IL, Legal Extern, Sept–Dec 2022
- Researched antitrust and evidentiary questions and reviewed documents for criminal investigations, settlements, and discovery, including bid-rigging conspiracies and government contract set-aside fraud

Selendy Gay Elsberg, PLLC, New York, NY, Summer Associate at Litigation Boutique, May–Jul 2022
- Researched securities, antitrust, and employment discrimination case law and a proposed agency rule to support a brief opposing a motion to dismiss, post-hearing briefing, and firm business development

Federal Trade Commission, New York, NY, Summer Law Clerk, Jun–Aug 2021
- Researched and wrote memoranda on federal antitrust and consumer protection legal issues, including FTC jurisdiction over competitor collaborations and admission of expert survey evidence
- Assisted in litigation of a business coaching scheme and investigation of a proposed horizontal merger

Professor Hajin Kim, The University of Chicago Law School, Chicago, IL, Research Assistant, Jun–Jul 2021
- Collected legislative and executive materials and other primary sources for a global comparison of carbon tax and cap-and-trade price and quantity estimates

Hamilton Place Strategies, Washington, D.C., Associate at Public Affairs Consultancy, Jan 2019–Jul 2020
- Advised corporate, industry coalition, and philanthropic executives on public policy persuasion through data-driven communications such as fact sheets, slide decks, white papers, and social media

Eno Center for Transportation, Washington, D.C., Policy Fellow, May–Nov 2018
- Informed live policy debates by analyzing data for, writing, and editing reports on transportation topics, including infrastructure financing, international aviation, and taxation of rideshare companies

U.S. Department of Transportation Office of Inspector General, Washington, D.C., Intern, Jan–Apr 2017
- Researched federal regulations, agency guidance, and appropriations law for oversight attorney team

INTERESTS

- Swimming, ceramics, hiking, urban planning, intramural broomball, and musical theater

THE UNIVERSITY OF CHICAGO

Name: So Jung Madeline Kim
Student ID: 12280694

University of Chicago Law School

Academic Program History

Program: Law School
Start Quarter: Autumn 2020
Current Status: Active in Program
J.D. in Law

External Education

University of Michigan-Ann Arbor
Ann Arbor, Michigan
Bachelor of Arts 2018

Beginning of Law School Record

Autumn 2020

Course		Description	Attempted	Earned	Grade
LAWS	30101	Elements of the Law David A Strauss	3	3	180
LAWS	30211	Civil Procedure Diane Wood	4	4	177
LAWS	30611	Torts Saul Levmore	4	4	174
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	180

Winter 2021

Course		Description	Attempted	Earned	Grade
LAWS	30311	Criminal Law Jonathan Masur	4	4	182
LAWS	30411	Property Lior Strahilevitz	4	4	178
LAWS	30511	Contracts Douglas Baird	4	4	176
LAWS	30711	Legal Research and Writing Adam Davidson	1	1	180

Spring 2021

Course		Description	Attempted	Earned	Grade
LAWS	30712	Legal Research, Writing, and Advocacy Adam Davidson	2	2	179
LAWS	30713	Transactional Lawyering David A Weisbach	3	3	176
LAWS	40101	Constitutional Law I: Governmental Structure Bridget Fahey	3	3	179
LAWS	44201	Legislation and Statutory Interpretation Farah Peterson	3	3	176
LAWS	47301	Criminal Procedure II: From Bail to Jail Alison Siegler	3	3	177

Summer 2021

Honors/Awards
The University of Chicago Law Review, Staff Member 2021-22

Autumn 2021

Course		Description	Attempted	Earned	Grade
LAWS	43228	Local Government Law Julie Roin	3	3	177
LAWS	46101	Administrative Law Jennifer Nou	3	3	182
LAWS	53299	Class Action Controversies Michael Brody	2	2	177
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton Robert Weinstock	2	2	182
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

Winter 2022

Course		Description	Attempted	Earned	Grade
LAWS	40301	Constitutional Law III: Equal Protection and Substantive Due Process David A Strauss	3	3	177
LAWS	53426	Disability Rights Law Req Designation: Meets Writing Project Requirement Andrew Webb Barry Taylor	3	3	180
LAWS	53427	Law & Political Economy Ryan Doerfler	2	2	180
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton Robert Weinstock	2	2	182
LAWS	94110	The University of Chicago Law Review Anthony Casey	1	1	P

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Date Issued: 06/01/2023

THE UNIVERSITY OF CHICAGO

Name: So Jung Madeline Kim
Student ID: 12280694

University of Chicago Law School

Spring 2022

Course		Description	Attempted	Earned	Grade
LAWS	42801	Antitrust Law Eric Posner	3	3	179
LAWS	43244	Patent Law Jonathan Masur	3	3	177
LAWS	46001	Environmental Law: Air, Water, and Animals Hajin Kim	3	3	179
LAWS	53104	Legal Profession: Ethics in Government and Public Interest Legal Practice Lynda Peters	3	3	177
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton Robert Weinstock	1	1	182
LAWS	94110	The University of Chicago Law Review	1	1	P
Req Designation:		Meets Substantial Research Paper Requirement Anthony Casey			

Summer 2022

Honors/Awards
The University of Chicago Law Review, Staff Member 2022-23

Autumn 2022

Course		Description	Attempted	Earned	Grade
LAWS	41101	Federal Courts Curtis Bradley	3	3	175
LAWS	42301	Business Organizations Anthony Casey	3	3	181
LAWS	81009	Intensive Trial Practice Workshop Herschella Conyers Erica Zunkel Judith Miller Craig Futterman Jorge Alonso	3	3	181
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	1	1	182
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P
LAWS	95030	Moot Court Boot Camp James Whitehead Stephen Patton	2	2	P

Winter 2023

Course		Description	Attempted	Earned	Grade
LAWS	40201	Constitutional Law II: Freedom of Speech Genevieve Lakier	3	3	176
LAWS	51702	Behavioral Law and Economics	3	3	179
Req Designation:		Meets Writing Project Requirement Jonathan Masur			
LAWS	53488	Advanced Antitrust: Mergers and Acquisitions Eric Posner	2	2	176
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	1	1	182
LAWS	92000	Greenberg Seminars: The Evil Corporation Emily Underwood Anthony Casey Joshua C. Macey	0	0	P
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Spring 2023

Course		Description	Attempted	Earned	Grade
LAWS	41601	Evidence John Rappaport	3	3	177
LAWS	53432	Climate Change and the Law Hajin Kim Joshua C. Macey	3	3	179
LAWS	90224	Abrams Environmental Law Clinic Mark Templeton	2	2	182
LAWS	92000	Greenberg Seminars: The Evil Corporation Emily Underwood Anthony Casey Joshua C. Macey	1	1	P
LAWS	94110	The University of Chicago Law Review Anthony Casey	0	0	P

Honors/Awards
Pro Bono Honors

The Ann Watson Barber Outstanding Service Award, for exceptional contribution to the quality of life at the Law School

End of University of Chicago Law School

UNOFFICIAL TRANSCRIPT

Date Issued: 06/01/2023


THE UNIVERSITY OF
CHICAGO

Professor Jonathan Masur
John P. Wilson Professor of Law
The University of Chicago Law School
1111 E. 60th Street
Chicago, IL 60637
jmasur@uchicago.edu | 773-702-5188

June 23, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Dear Judge Davis:

I write to offer a very strong recommendation of So Jung Kim for a judicial clerkship. So Jung is a smart and diligent student who demands nothing but the highest quality work from herself and never fails to deliver. She has an incisive legal mind and an impressive capacity to navigate even the most complex legal problems. She is scheduled to clerk this coming year for Judge Terrence Berg of the Eastern District of Michigan, and she is now seeking an appellate clerkship. I know that she would arrive in chambers extremely well-prepared, ready to do superb work from the very first day, just as her work throughout law school has been excellent.

I first got to know So Jung through her exceptional work in my Winter 2021 Criminal Law class. This class was taught in the midst of the pandemic, before vaccines had become widely available, and so it was held under difficult circumstances. We were required by the university to maintain six feet of distance between students in the classroom, and thus we could not fit the entire class at one time into even our largest room. Accordingly, one week So Jung would be in the classroom, masked and separated from everyone by what felt like a vast distance; the next week, she would be at home on Zoom, trying her best to hear what was being said in the classroom. Needless to say, these were not ideal conditions under which to learn.

Yet despite these difficult conditions, So Jung absolutely thrived. I called on her four times during the quarter: to discuss a complex issue related to the federal sentencing guidelines; to discuss the law of omissions and the circumstances under which one individual might owe another an affirmative duty of care; to explain the special proximate cause rules that attach to felony murder; and finally, to analyze the “dangerous proximity” rule that governs the law of attempt in many states. So Jung’s performance was excellent on all four occasions, but it was the third occasion, related to the special proximate cause rule, that really stood out. The felony murder proximate cause rules are complex, and they differ in important ways from the standard proximate cause doctrines. But So Jung was not fazed. She stepped carefully through a series of critical cases, providing sharp analysis and thoughtful commentary on each one.

Her exam more than measured up to the blistering standard she had set in class. In particular, she navigated an incredibly complex question involving mistakes of fact and law with an acuity and deftness that I rarely see from a first-year student. Her writing was also fluid and concise—precisely what one hopes to see from top-flight legal writing. She earned a high A on this exam (a 182), a grade that means an enormous amount at a school that still abides by a stringent curve and fights hard against grade inflation.

I was thus delighted when So Jung enrolled in my Patent Law course this past Spring. I have taught this course every year since I joined the faculty, but So Jung’s class was one of the strongest I have ever taught, filled with smart and hard-working students. Nonetheless, even amidst such intelligent peers, So Jung shone. The first week of class I decided to challenge her by asking a devilish series of questions related to patent claim interpretation. So Jung offered a brilliant and incisive answer, in which she engineered a way out of what had appeared to be an inescapable logical contradiction. She then performed superbly in response to a second cold-call, a week later, in which she addressed a series of complex issues related to patentability under the America Invents Act. Finally, several weeks after that she handled a complicated case about patent infringement with skill and precision that belied the newness and complexity of the material. Students without STEM backgrounds can sometimes struggle in patent law, given the technically complex subject matter. But not So Jung. She learned all of the necessary science to allow her skill in law to shine through brilliantly. She has an impressive and sharp legal mind and can reason through difficult problems whether or not they concern subjects she has previously studied. She finished the quarter by writing a strong exam that received a high grade.

So Jung is now a student in my Behavioral Law & Economics seminar. This is without question the most demanding course that I teach. Students read approximately thirty recent papers by leading scholars in behavioral law and economics, many of which have a high degree of technical complexity. The students are expected to write short reaction papers analyzing and critiquing the work and then discuss the articles in class. That is no small task—many law school faculty struggle to understand this very scholarship. The seminar is discussion-based, and the students are expected to carry the weight of the classroom discussion. I set very high standards for participation and engagement in this class, and many students struggle to meet them.

So Jung, by contrast, has thrived. She quickly demonstrated that she has a firm grasp on even the most technically difficult

concepts, and she immediately became one of the most important voices in class discussion. So Jung is particularly adept at cutting through the morass of legal or analytic complexity with strong, clear-eyed arguments. She knows how to gauge empirical evidence for its persuasiveness, and she formulates compelling arguments about even arcane subjects with accuracy and concision. I always know that I can turn to So Jung to stake out a thoughtful and well-defended position on any given issue. Her writing in the class has been equally superb. In particular, So Jung wrote an excellent short paper dissecting a study in which the authors used a monetary fine to create a new social norm that promoted the behavior for which individuals were being fined. She writes fluidly and clearly, which comes as no surprise because she thinks fluidly and clearly. Her ideas are expressed with precision and in detail, and the text only accentuates the brilliance and acuity of her thinking. I have not yet graded the class, but I fully expect that So Jung will earn an A.

Of course, my experiences with So Jung in the classroom are merely the tip of the iceberg. As I mentioned at the outset, she has already landed a wonderful clerkship with Judge Terrence Berg of the Eastern District of Michigan. She is now seeking an appellate clerkship to complement that experience. So Jung will be a terrific clerk for Judge Berg, and with a year's worth of experience under her belt she will be an even better clerk for whichever judge is fortunate enough to hire her next. So Jung is also a member of the Law Review and has taken on leadership roles in a number of other student organizations as well. It is no surprise that her peers trust her in such positions of responsibility. She is a warm and generous student who constantly seeks out the best in the people around her. She has no discernable ego, which is remarkable for a student of her talent. I am confident that she will be not just a great clerk but a beloved co-clerk as well.

So Jung Kim is a smart, talented, and diligent student with a great career in front of her. She is an excellent legal writer who will do terrific work from her first day on the job. And she is someone who will be a delight to work with in the small confines of a judicial chambers as well. I would trust her with a delicate legal matter right now, and I am confident that she will be a great success for any judge who has the good fortune to hire her. I recommend her very strongly.

Sincerely,

Jonathan Masur
John P. Wilson Professor of Law

Jonathan Masur - jmasur@uchicago.edu - 773-702-5188

THE UNIVERSITY OF CHICAGO
THE LAW SCHOOL
Abrams Environmental
Law Clinic

Mark N. Templeton
Clinical Professor of Law
Director, Abrams Environmental Law Clinic

T 773.702.6998
templeton@uchicago.edu

June 26, 2023

The Honorable Stephanie Davis
Theodore Levin United States Courthouse
231 West Lafayette Boulevard, Room 1023
Detroit, MI 48226

Re: Clerkship Recommendation Letter for So Jung Kim

Dear Judge Davis:

I write today to endorse enthusiastically So Jung Kim's application to serve as your clerk. Since the Fall Quarter of 2021, I have worked extensively with So Jung as her primary supervising attorney in the Abrams Environmental Law Clinic. So Jung is among the top students with whom I have worked during my ten years of clinical teaching: she is a bright, hard-working, and collaborative legal researcher and writer. So Jung has made essential contributions to several significant pieces of litigation conducted by the Abrams Environmental Law Clinic, and I know that she would contribute significantly to your chambers.

Since she joined the Clinic, So Jung has been an indispensable member of the Clinic's "Michigan Energy" team. For the past five years, the Clinic has represented Soulardarity, a grassroots energy justice nonprofit, in approximately ten different administrative proceedings before the Michigan Public Service Commission (Commission), advocating for clean energy, affordable rates, and equitable service for the low-income, people-of-color community in and around the Detroit metropolitan area. So Jung worked on two new and important cases for Soulardarity and its coalition partners last year. In the first case, the local monopoly electric utility, DTE Electric (DTE), sought to implement a new program that allows customers to "prepay" for their electricity like a prepaid cellphone plan. While this may sound like an acceptable and even valuable option for customers, the company would have targeted its marketing to "payment troubled and vulnerable customers"—DTE's own words—and it requested waivers of essential consumer protections, including due process rights before disconnection. In the second proceeding, DTE sought to increase residential customers' electricity rates by $300 million, even though Michigan has the highest residential electricity rates in the continental United States, aside from New England and West Coast states.

So Jung's research has been excellent, both in terms of facts and law. In the Prepay case, she